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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

SEPTEMBER TERM, 1889—JANUARY TERM, 1890.

VOLUME XXVIII.

D. A. CAMPBELL,

OFFICIAL REPORTER.

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In behalf of the people of Nebraska.

Rec. Sep. 19, 1891.

THE SUPREME COURT

OF

NEBRASKA,

1891.*

CHIEF JUSTICE,
AMASA COBB.

JUDGES,
SAMUEL MAXWELL,
T. L. NORVAL.

OFFICERS.

ATTORNEY GENERAL,
GEORGE H. HASTINGS.

CLERK AND REPORTER,
D. A. CAMPBELL.

DEPUTY CLERK,
W. B. ROSE.

* On January 9, 1890, the court was reorganized, Chief Justice M. B. Reese retiring, Amasa Cobb succeeding him, and T. L. Norval assuming the duties of office. The decisions reported in this volume preceding page 485 were rendered under the former organization of the court.

DISTRICT COURTS OF NEBRASKA.

JUDGES.

FIRST DISTRICT.

JEFFERSON H. BROADY, Beatrice.
THOMAS APPELGET, Tecumseh.

SECOND DISTRICT.

SAMUEL M. CHAPMAN, Plattsmouth.

THIRD DISTRICT.

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A. S. TIBBETTS, Lincoln.
CHARLES L. HALL, Lincoln.

FOURTH DISTRICT.

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FRANK IRVINE, Omaha.

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EDWARD BATES, York.
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SIXTH DISTRICT.

A. M. POST, Columbus.
WILLIAM MARSHALL, Fremont.

SEVENTH DISTRICT.

WILLIAM H. MORRIS, Crete.

DISTRICT COURTS OF NEBRASKA. 1

EIGHTH DISTRICT.

W. F. NORRIS, Ponca.

NINTH DISTRICT.

ISAAC POWERS, JR., Norfolk.

TENTH DISTRICT.

WILLIAM GASLIN, JR., Alma.

ELEVENTH DISTRICT.

T. O. C. HARRISON, Grand Island.

E. M. COFFIN, Ord.

TWELFTH DISTRICT.

FRANCIS G. HAMER, Kearney.

THIRTEENTH DISTRICT.

A. H. CHURCH, North Platte.

FOURTEENTH DISTRICT.

JAMES E. COCHRAN, McCook.

FIFTEENTH DISTRICT.

MOSES P. KINKAID, O'Neill.

A. W. CRITES, Chadron.

2 DISTRICT COURTS OF NEBRASKA.

STENOGRAPHIC REPORTERS.

FIRST DISTRICT.

P. E. BEARDSLEY, Lincoln.
R. H. POLLOCK, Pawnee City.

SECOND DISTRICT.

W. H. WHEELER, Lincoln.

THIRD DISTRICT.

O. A. MULLON, Lincoln.
BERT E. BETTS, Lincoln.
F. E. BELL, Lincoln.

FOURTH DISTRICT.

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C. C. VALENTINE, Omaha.
A. M. HOPKINS, Omaha.
CHARLES A. POTTER, Omaha.
H. M. WARING, Omaha.
THOMAS P. WILSON, Omaha.
WILLIAM S. HELLER, Omaha.

FIFTH DISTRICT.

T. E. HAMILTON, York.

SIXTH DISTRICT.

FRANK J. NORTH, Columbus.
E. R. MOCKETT, Fremont.

SEVENTH DISTRICT.

C. L. TREVITT, Lincoln.

EIGHTH DISTRICT.

GEORGE COPELAND, Neligh.

DISTRICT COURTS OF NEBRASKA. 3

NINTH DISTRICT.

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TENTH DISTRICT.

F. M. HALLOWELL, Kearney.

ELEVENTH DISTRICT.

C. W. PEARSALL, Grand Island.

E. B. HENDERSON, Albion.

TWELFTH DISTRICT.

J. W. BREWSTER, Hastings.

THIRTEENTH DISTRICT.

E. A. CARY, North Platte.

FOURTEENTH DISTRICT.

A. D. GIBBS, McCook.

FIFTEENTH DISTRICT.

A. L. WARRICK, Ainsworth.

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The syllabus in each case was prepared by the judge writing the opinion, in accordance with rule 20.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF NEBRASKA.
SEPTEMBER TERM, A. D. 1889.

PRESENT:
HON. M. B. REESE, CHIEF JUSTICE.
" AMASA COBB, } JUDGES.
" SAMUEL MAXWELL, }

J. W. GERMAN ET AL. V. SAMUEL K. BOSLOUGH.

[FILED NOVEMBER 21, 1889.]

Replevin: BURDEN OF PROOF. Where B. replevied certain property taken in execution by G., a constable, and upon the trial the question turned upon whether the judgments upon which the executions were issued had been paid, as claimed by the plaintiff in replevin, an instruction, requested by defendants, telling the jury that the burden of proving payment was upon the plaintiff, *held*, erroneously refused.

ERROR to the district court for Gage county. Tried below before BROADY, J.

Burke & Prout, for plaintiff in error:

If the testimony in rebuttal, as to the agreement between Griffin and Aldrich for the settlement of the judgments upon which the executions were issued, was admissible at all, the burden of showing payment of such judgments

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rested on defendant in error. A mortgagor of chattels, so long as he holds possession, has such an interest as can be levied on. (*Burnham v. Doolittle*, 14 Neb., 217; *Chicago Lumber Co. v. Fisher*, 18 Id., 339.)

Pemberton & Bush, contra:

The mortgaged property was not subject to levy under the executions. (*Smith v. Kouts*, 7 N. W. Rep. [Ia.], 185; *Wells v. Chapman*, 13 Id., 841; *Adams v. Bank*, 4 Neb., 370; *Lorton v. Fowler*, 18 Id., 224; *Peckinbaugh v. Quillin*, 12 Id., 588.) The proper remedy was garnishment. (*Faulkner v. Meyers*, 6 Neb., 414.) An officer claiming title to property under process in his hands must show a valid, unpaid judgment (*Beach v. Botsford*, 1 Doug. [Mich.], 199; *Wells on Replevin*, sec. 180); and there was no evidence of such a judgment in this case. The questions were all passed upon by the jury, and a reviewing court will not interfere.

COBB, J.

The plaintiff in the court below complained of J. W. German, constable, and Neil Griffin, defendants, and alleged that he had a special ownership in one certain span of bay mares, both four years old, of the value of \$300, and that he was entitled to the immediate possession of the same; that the defendants wrongfully and unlawfully detain the same from his possession, to his damage two dollars, and that the same were not taken in execution, or on any order, or judgment against him for the payment of any tax, fine, or amercement assessed against him, or by virtue of any order of delivery issued under the code of civil procedure providing for the replevin of property, or on any other mesne or final process against him, and prays judgment for the possession of said property and damages for the detention thereof, or for the sum of \$300, the value thereof.

The defendant German set up his defense in an affidavit stating that at the commencement of this action he was and is a constable for Wymore township, in said county; that he had possession of the property replevied in this action by virtue of two executions in favor of Neil Griffin and against H. H. Aldrich, issued out of justice's court, and which he had levied, as such officer, upon the property in question as the property of said Aldrich; and that said Griffin has, or claims to have, an interest in the property, and is the real party defendant in this suit, and prays that he may be made such.

The defendant Griffin set up in his affidavit that he has an interest in the property sought to be recovered in this action as the execution creditor in the two executions levied on the property in question as that of H. H. Aldrich, the execution debtor. Affiant asks to be made a party defendant in this action.

There was a trial to a jury, with verdict that at the commencement of this action the right of possession of the property was in the plaintiff, and assessing the damages at the sum of \$5; and, the motion for a new trial being overruled, judgment was entered on the verdict.

The defendants having duly excepted on the record, assign the following errors:

1. The verdict is contrary to the law and the instructions of the court.
2. It is not supported by the evidence.
3. It was given under the influence of passion and prejudice, and without regard to the evidence or the instructions of the court.
4. In admitting the evidence of H. H. Aldrich and the witness Wilson in rebuttal, as to the settlement between Griffin and Aldrich, over defendants' objection.
5. In refusing defendants' instructions, 7, 8, and 9.
6. In giving instructions on its own motion, 1, 2, and 3.
7. In overruling the motion for a new trial.

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It appears from the record that on the 6th day of August, 1887, J. W. German was a constable of the town of Wymore, Gage county, and had in his hands an execution against H. H. Aldrich in favor of Neil Griffin. It was originally issued for \$184.81 debt, and \$21.65 costs; total, \$206.46; also another execution in favor of said Neil Griffin, and against the said H. H. Aldrich, issued in another case for \$39.60 costs. It also appears from the bill of exceptions that on the said day the said H. H. Aldrich was the general owner of two bay mares about four years old, one double spring wagon, one set double harness, and two fly nets, which he had conveyed by mortgage to one H. A. Greenwood for the consideration of \$157; \$20 of which had been paid. A copy of this mortgage had been filed in the office of the county clerk, and was in fact known to the said constable, who applied to the said Greenwood and obtained his consent and permission to levy the said executions upon the said property, subject to the said mortgage, and thereupon levied the same and seized the said property. On the same day, or a few days thereafter, the said Greenwood, as he testifies, sold and delivered the note, secured by the said mortgage, to the plaintiff, who thereupon replevied the said property from the said constable. Upon his application, Neil Griffin was also made a party defendant with the constable, German.

Upon the trial the principal effort on the part of the plaintiff seems to have been to show that the judgments, or one of them, upon which the executions were issued, had been paid and satisfied before the date of the issuing of said executions.

The following instructions to the jury were given by the court on its own motion:

"1. This is an action of replevin in which the turning point is the right of possession of the things replevied. At the commencement of this action the plaintiff in the evidence claims under the mortgage note he has offered in evidence.

If at the time of the levy of the execution defendants have offered in evidence, the owner of said mortgage note consented to such levy, the property by such consent became subject to said levies. The effect of the levies depends upon the validity of the said several executions. The validity of each of said executions depends upon whether there was a subsisting unsatisfied judgment upon which the execution issued at the time of its issue. The judgments and executions are sufficient in form and must be taken for just what they say, unless you believe from the evidence that the judgments, or one of them, have been satisfied in whole or in part beyond what is shown on the judgments or executions themselves. The judgments and executions were good, if for anything, only for the amount due and unsatisfied on the judgments. It is a question of fact for you to determine how much, if anything, has been paid on the judgments in money or property, and how much, if anything, was due on the judgments at the time of said levies. If anything was due on the judgments at the time of the levy, the levy was good as against the judgment debtor, Aldrich, for the amount due on the judgment and gave the officer the right of possession as against said Aldrich; and if the levy was consented to by the owner of the mortgage note, then the levy gave the officer the right of possession as against plaintiff. If the levies were not made with the consent of the owner of the said mortgage note, the officer making the levy did not become entitled to the possession of the property as against the mortgagee.

"2. If you find that at the commencement of this action the plaintiff was entitled to the possession of the property replevied, you will so state in your verdict and assess the plaintiff's damages for the wrongful detention.

"3. If you find that at the commencement of this action the defendant German, as constable, was entitled to the possession of the property, you will assess the value of such right of possession at the amount due and unsatisfied on

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said judgments and executions, provided you find that the value of the property was sufficient to satisfy the amount of said mortgage debt and the amount due on said judgments; but if you find that the value of the property was not sufficient to pay both the mortgage and judgment debts, you will find (in case you find for defendants) the value of the right of possession to be the value of the property less the amount of the said mortgage debt."

No error in these instructions is specifically pointed out, and I fail to see any reversible error in them.

The defendants requested the court to give the following instruction:

"No. 7. You are instructed that the amount due upon the two judgments in favor of Neil Griffin v. H. H. Aldrich, as shown by the transcript in the one case, and by the docket of S. S. Newton in the other, is to be taken as correct, unless the contrary is shown by a preponderance of the testimony, and that the burden to so prove such fact is upon the plaintiff."

While the language of this instruction is not very rhetorically expressed (which was not necessary), I think that it is good in substance, and ought to have been given. The constable defendant had levied upon property subject to a mortgage lien of \$107, to satisfy two judgments, one rendered by C. A. Burnham, justice of the peace, for \$184.81 and \$21.65 costs of suit; total, \$206.46; and the other rendered by S. S. Newton, justice of the peace, for costs amounting to \$39.60. There were certain sums admitted to have been paid on the former of these judgments, and credited thereon; but the efforts of the plaintiff were chiefly directed upon the trial to an effort to prove that at sundry times and in various ways after the rendition of the said judgments, payments had been made thereon by Aldrich, the judgment defendant therein, until and so that at the date of executions nothing whatever was due upon either of the judgments. The judgments showed for themselves; as the

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court very properly instructed the jury, both on its own motion and at the request of the defendants. Surely it was not incumbent upon the defendants to prove that they had not been paid. If there was any proof of payment to be made, the burden of making it was clearly upon the plaintiff and the jury should have been so instructed.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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STEWART-CHUTE LUMBER COMPANY, APPELLANT, v.
MISSOURI PACIFIC RAILWAY COMPANY ET AL., AP-
PELLEES.

[FILED NOVEMBER 21, 1889.]

1. **Material Men: LIENS: RAILROADS.** Sec. 2, ch. 54, Comp. Stats., *held*, to give a lien upon a railroad to *all persons* who shall perform labor or furnish material in the construction of such railroad.
2. ———: ———: **MATERIAL FURNISHED SUBCONTRACTOR.** Lumber, posts, building paper, and lath, sold by dealers in lumber to a subcontractor engaged in building a railroad, and delivered to him to be used in the erection of shanty boarding houses and stables on or near the line of the railroad for the use of the men and animals employed and used by such subcontractor in and upon such work, *held*, to be materials furnished in the construction of the railroad, within the intent and meaning of the statute. MAXWELL, J., dissents.
3. ———: **LIEN ATTACHES AT DELIVERY.** In an action to enforce a lien upon a railroad for material furnished in its construction, *held*, that the lien attached immediately upon the furnishing of such material to the subcontractor in good faith by the material man, and that it was not necessary to allege or prove the actual application of such material to the purpose intended. MAXWELL, J., dissents.

APPEAL from the district court for Lancaster county.
Heard below before FIELD, J.

Mason & Whedon, for appellants:

Sec. 2, art. 2., ch. 54, Comp. Stats., providing for a lien for laborers and material men, is a remedial statute and should be liberally construed. (*Rogers v. Omaha Hotel Co.*, 4 Neb., 48.) The evident intention of the legislature, as gathered from the act itself, was that a railroad company should see that all material used in construction was paid for by the contractor. Such intention is defeated by the narrow construction of the court below, that the material must have been made a permanent part of the road-bed in order that the lien might attach. Under a statute analogous to the above, one who cooks food for men engaged in logging has a lien on the logs for his wages. (*Winslow v. Urquhart*, 39 Wis., 267.) Hence a proper construction of this act would give a lien to one who furnishes material to be used for the shelter of men and teams at work on the grade. By the judgment below, appellant is compelled to lose the price of material furnished in good faith and used in construction, while Casement, Carlile & Co. retain the money due Kavanaugh, and the latter's property is confiscated.

Talbot & Bryan, contra:

While lien laws of a general nature are to be liberally construed, they should not be so extended as to include subjects not contemplated by the legislature. (*Houck on Liens*, sec. 67, p. 79; *Phillips v. Stone*, 25 Ill., 77.) Moreover, the act under consideration is a special and not a general lien law. (*Overton on Liens*, chap. 4, p. 40.) Appellant is a mere vendor of material. It is not therefore within the class specified in, and not entitled to the benefits of, a statute giving a lien to material men, contractors,

and subcontractors; especially as the design of this class of statutes is to enable such parties to obtain credit. (*Burst v. Jackson*, 10 Barb. [N. Y.], 219; *Hatch v. Coleman*, 29 Id., 201; *Sweet v. James*, 2 R. I., 270; *Greenwood v. Tenn. Mfg. Co.*, 2 Swan [Tenn.], 130; *East Tenn. Mfg. Co. v. Bynum*, 3 Sneed [Tenn.], 268.) In order that the lien might attach, the material sold should have become a permanent part of the road-bed and enhanced its value. (Houck on Liens, sec. 54, p. 69; *Chapin v. Paper Works*, 30 Conn., 473; *Hunter v. Blanchard*, 18 Ill., 118; *Perkins v. Pike*, 42 Me., 141; *Phillips v. Wright*, 5 Sandf. [N. Y.], 342; *Esterley's Appeal*, 54 Pa. St., 195; *The Young Mechanic*, 2 Curtis [U. S.], 404, 421; *Basshorst v. B. & O. R. Co.*, 65 Md., 99; S. C., 3 Atl. Rep., 285; in the latter case the court construes a statute similar to ours, but stronger in its provisions.) *Winslow v. Urquhart*, 39 Wis., 267, was under a statute altogether different from ours. The cook, who was there declared to have a lien on the logs, was one of the parties actually engaged in the work. The material in this case was merely a part of the working plant of Kavanaugh, the subcontractor. The principle contended for by appellant, that it should have a lien because its material was used for shelter, would also give a lien on the railroad to the clothier, the harness maker, and the hardware merchant for wares furnished a subcontractor.

COBB, J.

This cause was appealed by the plaintiff from the judgment of the district court of Lancaster county.

The appellant is a private corporation under the laws of Illinois, doing business in this state as the Stewart-Chute Lumber Company.

It alleges that the Missouri Pacific Railway Company is a corporation operating its lines in this state, and that the firm of Casement, Carlile & Co. is a copartnership doing

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business in this state, which, with Marcus Kavanaugh, are made defendants.

It sets up that the railway company was engaged in constructing its line between Weeping Water, in Cass county, and Lincoln, in Lancaster county; that Casement, Carlile & Co. were contractors to grade the line; that Marcus Kavanaugh was a subcontractor, under that firm, to grade sections 10, 11, and 12, extending three miles into Lancaster county; that the plaintiff sold and delivered to Kavanaugh lumber and other necessary material to be used, and which was actually used, in the construction of the railroad line in Lancaster county, amounting to \$296.19; that subsequently Casement, Carlile & Co. retained that sum from payments due to Kavanaugh, as subcontractor, and still retains the same, without payment to the plaintiff; that on July 6, 1886, within sixty days after furnishing the lumber and other necessary material to the subcontractor, the plaintiff filed for record in the clerk's office of the county clerk of Lancaster county the proper legal statement of its claim, perfecting its lien for the amount stated upon the line of the Missouri Pacific Railway Company in Lancaster county, and that its claim is due from said company and unpaid, for which judgment is asked, and for such certain remedy as the law provides.

The railway company entered its appearance, admitted its corporate capacity, and that the plaintiff is a corporation as alleged, and denied all other allegations.

Casement, Carlile & Co. answered admitting they were contractors as alleged and denied all other allegations.

There was a trial, on submission to the court, a jury being waived, and judgment for the plaintiff against M. Kavanaugh for \$332.50, with findings for the defendants, the Missouri Pacific Railway Company, and Casement, Carlile & Co., that the plaintiff take nothing against them, and that they recover their costs; to which the plaintiff excepted on the record, and its exceptions were settled and allowed according to law.

The following sections of chapter 54, art. 2, of the Compiled Statutes contain the provisions of statute law applicable to the case:

"Sec. 2. And when material shall have been furnished, or labor performed in the construction, repair, and equipment of any railroad, canal, bridge, viaduct, and other similar improvement, such labor [laborer] and material man, contractor or subcontractor, shall have a lien therefor, and the said lien therefor shall extend and attach to the erections, excavations, embankment, bridges, road-bed, and all land upon which the same may be situated, including the rolling stock thereto appertaining and belonging, all of which, including the right of way, shall constitute the excavation, erection, or improvement provided for and mentioned in this act.

"Sec. 3. Every person, whether contractor or subcontractor, or laborer or material man, who wishes to avail himself of the provisions of the foregoing section, shall file with the clerk of the county in which the building, erection, excavation, or other similar improvement, to be charged with the lien, is situated, a just and true statement or account of the demand due him after allowing all credits, setting forth the time when such material was furnished or labor performed and when completed, and containing a correct description of the property to be charged with the lien, and verified by affidavit; such verified statement or account must be filed by a principal contractor within ninety days, and by a subcontractor within sixty days, from the date on which the last of the material shall have been furnished, or the last of the labor is performed; but a failure or omission to file the same within the periods last aforesaid shall not defeat the lien, except against purchasers or incumbrances in good faith, without notice, whose rights accrued after the thirty or ninety days, as the case may be, and before any claims for the lien was filed: *Provided*, That when a lien is claimed upon a rail-

way the subcontractor shall have sixty days from the last day of the month in which said labor was done, or material furnished, within which to file his claim therefor; and, *Provided further*, That when any such material is furnished or work done in any unorganized county in this state, such statement of the demand due, verified as aforesaid, may be filed in any county in this state into or through which any such railroad or canal may run, or in the organized counties lying next nearest east of the county where said work was done or material furnished: *Provided further*, That such lien shall continue for the period of two years, and that any person holding such lien may proceed to obtain judgment for the amount of his account thereon by civil action; and when any suit or suits shall be commenced on such accounts within the time of such lien, the lien shall continue until such suit or suits be finally determined and satisfied."

Counsel for appellees in the brief state the first and principal question in this case to be, "Was the material sold by appellant to M. Kavanaugh, the subcontractor, used in the construction, repairing, and equipment of appellee's railroad within the meaning of this (the 2d) section?" This is nearly correct, but not strictly so; accurately stated it is, Was the material sold by appellant to the subcontractor "furnished" in the construction of appellee's railroad within the meaning of the section? There is a wide difference in the meaning of the two words "used" and "furnished" in the connection in which the latter is used in the section, and I think that it was used by the framers of the provision for the purpose and with the intent that the lien should attach upon the furnishing of the material in good faith by the material man, and upon its passing from his control to that of the contractor, subcontractor, or builder of the railroad, and that that word was used with the purpose of preventing a construction which may have been placed upon some former lien

laws, requiring the material man to allege and prove that the material furnished by him was not only delivered to the builder, but was actually used in the building.

The appellee railway company was engaged in the construction of its line from Weeping Water to Lincoln; the defendants, Casement, Carlile & Co., were its contractors for the construction of the road, or that part of it with which we are concerned, and Kavanaugh was the subcontractor under them for the construction of certain sections of the work, near the city of Lincoln. The appellant was a private, incorporated company, carrying on business as a wholesale and retail lumber dealer in the city of Lincoln.

About the time of commencing the construction of the sections of railroad work for which he was subcontractor under Casement, Carlile & Co., the contractors under the railway company, Kavanaugh ordered and purchased from the appellant the material, consisting of lumber, posts, building paper, and lath, set out in the bill of particulars, for which the lien was filed and for which the action was brought. This material was used by the said subcontractor in the erection of shanty boarding houses for the men, and stables for the horses, engaged and used by said subcontractor in the construction of the sections of said railroad work, for which he had the subcontract. These shanties and stables were not erected on the right of way of said railroad, but at convenient points about one hundred and fifty yards from the line of the road. Was this lumber, building paper, posts, and lath material furnished in the construction of the railroad? This question may be discussed at this point because, in my view, when material is once furnished in the construction, repair, or equipment of a railroad, so as to entitle the material man to a lien, under the provisions of the statute which we are now considering the lien attaches upon the furnishing; and it confuses rather than enlightens us to continue the statement of facts as to what was done with the remains or *debris* of this

material; or with the material itself after it was furnished and passed absolutely and entirely from the control or dominion of the material man furnishing it.

No one will doubt that it is the duty of this court, upon a case being presented calling therefor, to ascertain, if it can, the object, meaning, and intention of the legislature in enacting the law referred to. For this purpose we are, first, to look to the language of the law. If its language is plain, its words consistent with each other, and its provisions not inconsistent with those of other statutes nor within any constitutional inhibition, then the intention of the legislature, thus manifest, must be proclaimed as the law of the land. The words of this statute give a lien, first, when material has been "furnished," and second, when labor has been "performed." But it is contended that these words only apply to certain kinds of material or to material used in a certain and limited manner, and not to material "furnished" in the construction of the work generally. Applying the argument to this case, had the lumber and posts furnished by the appellant been used in the construction of a bridge, a depot building, or a water tank of the railroad, so as to remain a visible, tangible, and permanent part of the work, the material man furnishing it would have a lien therefor; but the material, for whatever purpose furnished, if not used so as to become and remain a visible, tangible, and permanent part of the work, would entitle him to no lien. This argument is worthy of respect, and were the appellant seeking to establish and maintain a lien upon general principles of the civil law it would probably be conclusive. But the meaning and force of a statute does not necessarily depend upon the "eternal fitness of things," nor yet upon the assembling together of words expressing ideas logically adapted to each other. It is quite within the all but infinite power of the legislature, in the absence of a constitutional inhibition, to so legislate that those who contribute to the erec-

tion of a building, a railroad, a ship, or a wagon in any way, directly or indirectly, may have a lien thereon for the value of such contribution, without regard to whether the thing contributed be of a substantial or unsubstantial, a visible or an invisible, character.

In the legislation which we are now considering, no discrimination was made between the different kinds or classes of laborers who might perform labor, nor in the different kinds of material that might be furnished, so long as the one was performed and the other "furnished in the construction, repair, and equipment of any railroads," etc. Construing the words of the act, and neither adding to them, nor suppressing any used by the legislature, our task, though difficult, is confined to a narrow compass. While in one sense the construction of a railroad may be said to consist in the actual placing of the material of which it is composed, it was in another and far more comprehensive sense that this word was used by the legislature in the sections under consideration. In this sense the construction commences with the laying out of the line, and the bringing of men, animals, and materials together, in which one of the important and indispensable things to do is to prepare convenient shelter for the men and animals. When this is done successfully, and the design carried out, and the men and animals thus sheltered and housed, do the work, fill up the road-bed, and dig out the excavations, the material so furnished must be considered as furnished in the construction of the railroad.

I have carefully considered the case of *Basshor v. B. & O. R. Co.*, 3 Atl. Rep., 285, cited by counsel for appellees, and do not think the law there decided at all applicable to the case at bar. All that was decided in that case was that a person sold certain machinery, used for the purpose of grinding material in the manufacture of artificial stone, to be used in the construction of certain railroad bridges, and certain appliances used for carrying the artificial stone to

the place where used by the contractor for the construction of the bridges, was not furnished in the construction of the bridges within the meaning of the mechanic's lien law of Maryland. I do not think there is much difference between the provisions of the law of Maryland and those of our own, so far as they are applicable to the question now under consideration; but the facts of the two cases are widely different. There the mill for grinding stone, to be used in manufacturing artificial stone, was erected at a point quite remote from at least one of the two bridges on which it was sought to extend the lien; because the two bridges were across different rivers, a good many miles apart, and the appliance, spoken of in the opinion, to be used to carry the stone when manufactured to the piers of the bridges, was most likely a steamboat to be used in carrying the manufactured stone from some common point on the Chesapeake bay, and up either one of the estuaries known, respectively, as the Big and Little Gunpowder. I agree with the writer of that opinion, that the machinery used as *the plant of a contractor*, remote as this one doubtless was from the work, could scarcely be said to be furnished in the construction of the work. But the shanties and temporary stables furnished by a railroad contractor for the shelter of his men and animals on the line, and at the scene of the work, are in no sense "a plant."

The case of *Winslow v. Urquhart*, 39 Wis., 260, is cited and relied on by counsel for appellant. That case is applicable, and illustrative of the principles which, as I think, govern the case at bar, and chiefly in showing the inadmissibility of the proposition that under our statute a lien only attaches for such material used in the construction of the railroad as becomes a visible and tangible part of the work. As I understand the facts of that case, one McCaulley had a contract to cut and drive sawlogs for Winslow & Co. For the purpose of filling the contract he had in his employment a large party of men, and employed one Brooks to

cook for them, which he did. His wages not being paid, he sued McCaulley therefor, and attached the logs, claiming a lien thereon for his wages, as cook for the men who cut and drove them. The statute, under which this claim was made—I quote from the opinion in the case (Tay. Stats. 1768, § 25)—“gives to any person who shall furnish any supplies, or who may do or perform any labor or services in cutting, falling, hauling, driving, running, rafting, booming, or towing any logs, or timber, * * * a lien on such logs or timber for the amount due for such supplies, labor, or services.” Judgment was rendered for Brooks for the amount due him, and establishing his lien on the logs. An order of sale was issued, and the logs sold thereon, and, as I suppose, bought at the sale by Urquhart. Thereupon Winslow & Co., the general owners, brought replevin for the logs in the circuit court, where they obtained judgment. Upon appeal to the supreme court the judgment was reversed and the lien sustained. The following remarks of Judge Lyon, in delivering the opinion, seem to me to be eminently just and sound as applicable to the facts of that case, and are here reproduced as illustrative of the principles governing the case at bar: “It seems to us that the person who cooks the food for the men who fall the trees, and work directly and immediately upon the logs or timber, performs service in cutting, falling, driving, etc., such logs or timber, within the meaning of the statute, equally with those who use the axe, the saw, or the team, to the same end. These are all engaged in the business of manufacturing trees into logs and timber, and transporting the same from the forest to a market; and to accomplish the common purpose the labor of each in his department is necessary. Moreover, he who cooks the food ‘furnishes supplies’ equally with the person who furnishes the raw materials. The acts of both are essential to the supplying of the men with food and both ‘furnish supplies’ within the meaning of the statute. Both, also, render ‘services on logs or timber’ within the

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meaning of the averment to that effect required in the affidavit to be annexed to the attachment. * * * The statute under consideration was enacted in the interest of labor, and a sound public policy requires that it be liberally construed. The construction contended for on behalf of the plaintiffs is too narrow, and, if adopted, would go far to defeat the objects and purposes of the statute. We cannot adopt it, but must hold that the claim of Brooks, in the attachment suit, was within the statute" (p. 268).

The second contention of counsel for appellees is that "the appellant is not a party belonging to the class mentioned and specified in the statute, and is, therefore, not entitled to a lien on appellee's railway line." Under this head they insist that a material man under the section (2), in order to have a lien on the railway line constructed, must be a contractor; that there must have existed, between the material man and the railroad company, some contract, obligation, or understanding that the material, when furnished, would become a lien upon the line of road or would be a part of the road-bed or equipment; also, that the statute was designed for the benefit of the builders or contractors, and the liens given to subcontractors and contractors furnishing materials for the purpose of giving them credit, etc.

I have carefully examined the cases, cited to the above propositions, cases arising under the earlier mechanic's lien laws of the states of New York, Tennessee, and Rhode Island. While they contain doubtless fair constructions of those statutes, they afford us but little aid in the construction of our own, and certainly no authority for eliminating the words "laborer and material man" therefrom. With all the light furnished by these cases, I see no reason to doubt that a true construction of our statute gives to every one who labors or furnishes material in the construction of a railroad a lien therefor; nor that the order of material

by a contractor, subcontractor, or builder, and its delivery by the person from whom ordered, is all the contract necessary to constitute such person a material man, within the meaning of section 2 of our act, and entitles him to a lien therefor. The contention that a material man must also be a contractor, or subcontractor, to be entitled to the lien, is probably based upon the absence of a comma after the word material man and before the word contractor, as used in the section. While correct punctuation is of great utility and value, it is not always to be found in our statutes, and its absence will not be regarded as sufficient warrant for giving words a strained meaning.

The third proposition argued by counsel for appellee in the brief is, that "the material sold and used, in order to become a lien upon the property, must become a part of the property improved, and actually enter into and become a part of, and enhance the value of, the appellee's line of road so constructed." I have said about all that I desire upon this point while discussing the first proposition, but will add that the same words of the statute which give a lien for labor performed also give a lien for material furnished, and the same logic that applies to one must also apply to both. Applying the rule to labor, while it would give the laborer who piles up dirt and stone upon the line, or lays wooden bridges across the streams thereon, a lien therefor, it would deny it to his fellow who digs and removes earth and stone from the cut and tunnel through the mountain. I find no warrant for such a discrimination in the language of the act, and am confident that the spirit which actuated the legislature in its passage was of broad and general, and not of a narrow and partial, character.

The judgment of the district court is reversed, and a decree will be entered in this court for the plaintiff, establishing and declaring its lien upon the appellee's railroad,

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and for its foreclosure, in accordance with the prayer of plaintiff's petition and for costs in both courts.

JUDGMENT ACCORDINGLY.

REESE, CH. J., concurs.

MAXWELL, J., dissenting.

I am unable to concur in the views of the majority of the court, and will briefly state the reasons for my dissent.

This action was brought by the plaintiff against the defendant in the district court of Lancaster county to enforce an alleged lien against said defendant. The facts upon which the lien is claimed to exist are as follows: One Marcus Kavanaugh was a subcontractor in the construction of the Missouri Pacific Railroad in Lancaster county, and purchased from the plaintiff building material to the amount of \$296.19, to be used by said Kavanaugh in the construction of shanties for the persons engaged by him upon said subcontract, and also for the construction of stables for the teams used by said persons in grading said road. The shanties were not erected on the right of way, and had no connection whatever with the railroad.

A claim for a lien against the railway was duly filed in the office of the county clerk, and the necessary steps taken to perfect said lien, if such is given by the statute. On the trial of the cause in the court below judgment was rendered in favor of the defendant.

Section 2, chap. 54, art. 2, of Compiled Statutes of 1887, provides that, "When material shall have been furnished, or labor performed in the construction, repair and equipment of any railroad, canal, bridge, viaduct, or other similar improvement, such labor [laborer] and material man, contractor or subcontractor, shall have a lien therefor, and the said lien therefor shall extend and attach to the erec-

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tions, excavations, embankments, bridges, road-bed, and all land upon which the same may be situated, including the rolling stock thereto appertaining and belonging, all of which, including the right of way, shall constitute the excavation, erection, or improvement provided for and mentioned in this act."

It will be observed that the lien is given for material which "shall have been furnished or labor performed in the construction, repair and equipment of any railroad," etc.

Do these words include lumber for the shanties and stables of contractors or subcontractors which is purchased for themselves and remains their own property? I think not. In no sense is such material used in the construction, repair or equipment of the road. If so, then the railway company might be subject to a lien for food and clothing furnished the employees of the contractors and subcontractors, and it would be difficult to determine where its liability would cease. The evident intention of the legislature was to limit the lien to such material or labor as was used in the "construction, repair, and equipment" of the railway, and the law does not apply to cases of this kind. The judgment of the district court is clearly right, and should be affirmed.

28	58
32	690
28	58
38	684

ISAAC ADAMS, APPELLEE, V. EDWARD H. THOMPSON
ET AL., APPELLANTS.

[FILED NOVEMBER 26, 1889.]

1. **Real Estate: CONTRACT FOR SALE.** The evidence, which consisted of correspondence between plaintiff and defendant, by letters and telegraphic dispatches, and which is set out in the opinion at length, *held*, to constitute a contract for the sale of real estate. MAXWELL, J., dissents.
2. ———: ———: **DESCRIPTION.** Defendant owned but one tract of

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land in a subdivision of the city of O. This tract was referred to in the correspondence which constituted the contract, but without a definite description. This was *held* to be sufficient to admit parol evidence as to description.

3. ———: ———: PRIOR EQUITIES: PURCHASE WITH NOTICE. The defendant having purchased from the plaintiff's grantor with full knowledge of the plaintiff's purchase and his rights thereunder, took subject to such purchase. MAXWELL, J., dissents.

APPEAL from the district court for Douglas county.
Heard below before WAKELEY, J.

George B. Lake, and J. L. Kennedy, for appellants:

To establish an agreement for sale sufficient to entitle one to specific performance it must appear that there was a "clear accession on both sides to one and the same set of terms." (*Lanz v. McLaughlin*, 14 Minn., 72; *Hamlin v. Wistar*, 31 Minn., 418 [18 N. W. Rep., 145]; 2 Story, Eq. Jur., sec. 764.) A court of equity will not enforce performance where there is a misunderstanding as to the terms of sale (*Clay v. Ricketts*, 66 Ia., 362 [23 N. W. Rep., 755]); nor where it even seems *probable* that the parties have not agreed to the same thing. (*Burkhalter v. Jones*, 32 Kan., 5; *Eggleston v. Wagner*, 46 Mich., 610 [10 N. W. Rep., 37].) To entitle appellee to such relief his acceptance of Thompson's proposition must have been absolute and unequivocal (Pomeroy, Spec. Perf. of Contracts, sec. 63.) Thompson had a right to stand on a strict acceptance of his offer. (*Sawyer v. Broshart*, 67 Ia., 678 [25 N. W. Rep., 876].) A sale to another is a sufficient notice of withdrawal. (Pomeroy, Spec. Perf. of Contracts, sec. 61, and cases cited.) The description must be such that without contradiction or addition it can be applied to the very property intended. (*Ryan v. Davis*, 5 Montana, 505 [6 Pac. Rep., 339]; *Piereson v. Ballard*, 32 Minn., 263 [20 N. W. Rep., 193]; *Richards v. Snider*, 11 Oregon, 501 [3 Pac. Rep., 178]; *Tice v. Freeman*, 30 Minn., 389 [15 N. W. Rep., 674].)

Isaac Adams, pro se:

As to the sufficiency of the description: (cases cited by appellee on this point are referred to in opinion); in *Richards v. Snider*, cited by counsel for appellant, a demurrer for uncertainty in description was overruled. Their remaining cases are examples of descriptions which do not satisfy the statute of frauds. No time of performance having been agreed upon in the contract, the law merely requires performance or tender thereof within a reasonable time. (Brown, Statute of Frauds, sec. 384.) In equity an executory contract of sale is regarded as vesting title in the vendee. (Pomeroy, Spec. Perf. of Contracts, 314; Warvelle on Abstracts, pp. 288, 289.)

REESE, CH. J.

This was an action for the specific performance of a contract for the sale of real estate.

The suit was instituted in the district court of Douglas county by plaintiff Adams against defendant Thompson.

It was alleged in the petition that on the 13th day of November, 1886, the defendant Thompson was the owner in fee simple of the real estate described in the petition as lot number 12 of P. McShane's subdivision of the northeast quarter of the southeast quarter of section 30, township 15 north, range 13 east, and that at said time he made an agreement with plaintiff whereby said Thompson, in consideration of the sum of \$1,000, sold and agreed to convey to plaintiff the above described real estate; the terms of the sale being \$200 cash, \$485 in a note bearing eight per cent interest, secured by a mortgage on the premises, and the remainder—\$315—by assuming the payment of three certain notes made by the said Thompson in favor of John A. McShane for \$105 each, said notes being secured by a mortgage on the premises purchased; that in accordance with the terms of the agreement plaintiff was

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to deposit said cash payment, together with the said note of \$485 and the mortgage securing the same, in one of the banks of the city of Yankton, Dakota Territory, and upon which deposit being made defendant was to execute and deliver to said bank a deed to plaintiff for the premises in dispute. It was alleged that plaintiff had fully performed the terms and conditions of the contract on his part, but that defendant had refused to make the conveyance, and a decree for the specific performance of the contract was prayed.

Some time after the commencement of the action James E. Riley appeared and made application to be made a party defendant, alleging that he was the owner by conveyance of the real estate from plaintiff and that a determination of the controversy could not be had without his presence in court. Leave having been granted, he filed his answer alleging substantially the above facts. Subsequent to this plaintiff asked and obtained leave to file his supplemental petition, in which he alleged that after the commencement of the action Horace B. Ireys and William B. Shriver claimed to have acquired some interest in the real estate from defendant Thompson, subsequent to the filing of the petition, but alleging that they had purchased with full notice of plaintiff's right, and that as against him whatever title they had to the real estate was invalid and asking that they be decreed to convey the property to him.

Ireys and Shriver having been made parties, appeared and filed their answers to the petition and supplemental petition of plaintiff, denying the principal allegations therein, and alleging that they had purchased the real estate from Thompson prior to the pretended contract which plaintiff claimed had been made by him and without notice of any of his alleged rights; that they had paid the full consideration therefor and received a conveyance, and were the holders of the title in fee simple, and that Ireys had subsequently sold and conveyed the property to Shriver. In addition to the de-

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nial of any contract between plaintiff and defendant Thompson it was alleged that plaintiff had not complied with the terms of the offer made to him by Thompson, and that he had no right to demand the relief prayed for in his petition. Further, that whatever alleged contract was made between them was not in writing and therefore was within the statute of frauds and could not be enforced. The prayer of the answer and cross-bill was that the plaintiff and Riley be decreed to have no right in the real estate, that they be required to execute the proper conveyance to defendants, and that the conveyance from Thompson to Adams, and from Adams to Riley, be set aside and canceled upon the deed records for the county.

A trial was had to the district court, which resulted in findings of fact in favor of plaintiff. These findings were as follows :

“ 1. That the correspondence between plaintiff and defendant Thompson constituted a binding contract between them.

“ 2. That said correspondence sufficiently described the land in question to admit parol evidence to identify it.

“ 3. That there was a sufficient offer by plaintiff to perform the terms of the contract.

“ 4. That as against defendant Thompson, plaintiff was entitled to a specific performance of the contract.

“ 5. That, as the clerk of Shriver, Ireys was incapacitated to enter into a contract with Thompson which would be binding upon Thompson while the latter was not aware of the relations existing between Ireys and Shriver.

“ 6. That plaintiff, as equitable vendee of Thompson, had the right to rescind the conveyance to Ireys.

“ 7. That since both Ireys and Shriver had notice of the claims of plaintiff at the time of the conveyance to Ireys, the burden rested upon Ireys to prove affirmatively that he entered into a valid agreement for said conveyance without notice of plaintiff's equities.

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"8. That plaintiff has a sufficient interest in the controversy to maintain the action, notwithstanding his conveyance to defendant Riley.

"9. And finds generally for the plaintiff upon the issues.

"To each of which findings the defendants severally except."

A decree was rendered in favor of plaintiff, and from which defendants appeal.

As appears from the findings above quoted, the contract entered into between Adams and Thompson was wholly by correspondence, as also the alleged contract entered into between Thompson and the defendants. The correspondence between plaintiff and Thompson began on the 26th day of October, 1885, when plaintiff sent Thompson the following letter:

"OMAHA, NEB., Oct. 26, 1885.

"*E. H. Thompson, Esq., Yankton, D. T.*: DEAR SIR—Mr. Pollock, signal service office, informs me that you own lot in McShane's sub. Do you wish to dispose of your contract upon reasonable terms?

"Very truly, ISAAC ADAMS."

To this Thompson sent the following reply:

"YANKTON, D. T., Oct. 28, 1885.

"*Isaac Adams, Esq.*: DEAR SIR—Yours of the 26th at hand. I would not care to dispose of the five a. McShane sub. unless I received at least \$175 per acre. If you should want live on the land, or have some other honest man to do the same, I will let him use it, and the \$42 worth of lumber on it, several years, for breaking it.

"Yours truly, E. H. THOMPSON."

On the 6th of November Thompson again wrote Adams as follows:

"*Isaac Adams, Esq.*: DEAR SIR—I have been advised not to sell the five acres, and as your cash payment is so very small that I wouldn't know what to do with it, I

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think we better postpone the matter for the present. I will promise you, however, that when I wish to sell, I will give you the first chance. I have just received another letter from parties who want to purchase. If you know of anyone who would like to buy the lumber, or live on the land, I will give them a good chance.

"Yours truly, E. H. THOMPSON.

"P. S.—I told the other parties that I wouldn't sell for less than \$200 per acre. So if either of you would like to purchase at that figure, I would feel disposed to sell. The land was fenced, \$42 worth of lumber on it, and it is the best lot, richest soil, and creek. I was told it was worth \$175 per acre, about eighteen months ago, by a real estate agent."

The next letter appearing in the record is as follows:

"YANKTON, D. T., November 11th, 1885.

"*Isaac Adams, Esq.*: DEAR SIR—Yours of the 7th is at hand. I will take \$1,000 for the five acres, \$200 cash, and the remainder, \$500 in one year at 8 per cent, subject, of course, to the mortgage of \$300 and interest, payable to John McShane, all expenses attending the sale to be paid by purchaser.

"Yours truly, E. H. THOMPSON.

"P. S.—I would like to know if you will take the lumber at \$25, payable in a year."

In reply to this Adams sent Thompson the following telegraphic dispatch:

"11-13, 1885.

"*To E. H. Thompson, Yankton, D. T.*: Will take the five acres upon terms stated. ISAAC ADAMS."

Thompson then wrote Adams the following letter:

"YANKTON, D. T., Nov. 13, 1885.

"*Isaac Adams, Esq.*: DEAR SIR—Your telegram is at hand. You can make out the papers and send them with

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your cash payment to one of the banking houses here, the latter to be paid to me when the papers are in their hands properly signed for you. I inclose the names of three bankers here. You know the terms, \$1,000, \$200 cash, etc. Yours truly, E. H. THOMPSON."

On the 14th of November Adams wrote Thompson as follows:

"*Edward H. Thompson*: DEAR SIR—I telegraphed you yesterday accepting your terms as stated in your letter of the 11th instant, and to-day I have inclosed to the First National Bank of Yankton a certified check for \$196.75, mortgage for \$485, note for same am't due in one year at 8 per cent, and deed made out ready for your signature. Upon executing and acknowledging the deed the bank will deliver you check, note, & mtg. The mtg. due McShane, which I assume, calls for \$315, hence the other only \$485 instead of \$500, and the taxes for 1885 are due, \$3.25, which amount I have reserved for the purpose of paying them.

"In filling up the deed I presumed that you were single. If I err you will have to make another. The lumber I have no use for whatever, but if you desire will try and get some one to make you an offer for it. Assuming that you have made a good trade, and that I have assumed some risk of not getting out of it what I paid, I am,

"Very truly, ISAAC ADAMS.

"P. S.—Please forward deed as early as convenient and oblige. I. A."

Thompson then wrote Adams as follows:

"YANKTON, D. T., Nov. 16, 1885.

"*Isaac Adams, Esq.*: DEAR SIR—I suppose the deed, etc., are at the bank, but I haven't been there yet. The taxes are not due on lot 12 until next spring, according to the statement of Mr. John Rush. Please inquire into the matter. This may be a good sale, but I think it is very

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doubtful. I don't understand why the int. on \$300 for 3 mo. at 6% is \$15. Please explain.

"Yours, etc., E. H. THOMPSON."

This was followed by the following letter from Thompson :

"YANKTON, D. T., Nov. 17, 1885.

"*Isaac Adams, Esq.*: DEAR SIR—Your note does not bear interest, the pres. of the bank informs me. I suggest that you send a new note for \$500, bearing int. at 8%. The amount you have deducted for taxes, not due until May, will just about pay the interest due McShane at this time. There was a deed here from an Omaha man already for me to sign when your papers arrived, but I was willing to give you the preference because you wrote first and agreed to the terms first. Yours truly,

"E. H. THOMPSON."

To this Adams made the following reply :

"OMAHA, NEB., Nov. 18, 1885.

"*Mr. E. H. Thompson*: DEAR SIR—Replying to yours of the 16th, I enclose you your tax receipt, together with a statement from Mr. Rush respecting the taxes. Your error in mistaking delinquent for due is not an unnatural one, but I do not suppose that you intended to convey the property subject to a tax lien, when in the terms of sale you gave me you said nothing about the assumption of taxes. The original mtg. given by you Aug. 15, '83, is to secure 5 promissory notes of \$105 each, bearing interest at 6% per annum, payable semi-annually. There is now due three of those notes with interest since August 5 last. The terms which I accepted are in the following language, taken from your letter of the 11th inst.: 'I will take \$1,000 for the 5 acres, \$200 cash and remainder, \$500 in one year at 8%, subject of course to the mortgage of \$300 and interest, payable to John McShane, all expenses attending the sale to be paid by purchaser.' The interest referred to is

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that due since last Aug. on the above notes of \$315, I take it, for there is nothing else in the way of interest to assume. This interest is \$4.72, making \$1,004.72 I have paid for the lot in manner as follows :

Certified check.....	\$196 75
Cash for taxes.....	3 25
<hr/>	
Total cash.....	\$200 00
One mtg. for.....	485 00
One mtg. for.....	315 00
Int. on latter.....	4 72
<hr/>	
	\$1004 72

"I learned yesterday, in a casual conversation with Mr. Shriver, who owns 10 acres this sub., that he had sent some papers for this lot, but, as you are doubtless aware, it belonged to me from the date of my telegram accepting your terms.

"I trust the above explanation will be satisfactory to you, and that you will forward my deed without further delay. Very truly, ISAAC ADAMS."

This was again followed by a letter from Adams :

"OMAHA, NEB., Nov. 19, 1885.

"*Mr. E. H. Thompson:* DEAR SIR—I have forwarded to the First National Bank a new note for \$485, bearing 8% interest, as I intended to make the other and corresponding with mtg. I sent you.

"I also send you a statement from McShane as to the amount of the mortgage I have assumed. I have sold the land subject to these two mortgages, aggregating \$800. I want my deed by return mail. Do not fail to have it signed by your wife.

"If you still insist upon my paying you \$15 more than your contract calls for, merely because Shriver offered you this amount after you had sold the land to me, I shall send it to you upon the receipt of my deed. If you think,

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however, that I have complied with our agreement I shall expect you to return the note for \$15, which I herewith enclose. Very respectfully, ISAAC ADAMS."

On the 21st of November Thompson wrote Adams as follows:

"YANKTON, D. T., November 21, 1885.

"*Isaac Adams:* DEAR SIR—Yours of the 19th is at hand, with two enclosures. My wife requests me to say to you that she refuses to sign the deed, as we are offered \$70 for the lumber provided Mr. Shriver gets the land. She don't care to have me sell it at all because she regards it as a good investment. Mr. Shriver claims that he had his papers here first, which is a fact. He has spent three times as much money telegraphing as you have. Shriver don't know that you are bidding against him, or at least I haven't told him, but if you think proper you can see him and ascertain which of you will pay more for the property. If you decide that you can't pay more, I will have all your papers promptly returned, including your note of \$15.

"Yours truly, E. H. THOMPSON."

On the 23d of November this suit was instituted.

Thompson having deeded the property to Shriver and Irey and Adams having executed a deed to Riley, the contest is, in reality, between Riley, through Adams, and Shriver and Irey. As we view the case it seems to us that the controlling questions are: First, Does the correspondence between Adams and Thompson constitute a written contract between them for the sale of the property from Thompson to Adams? and second, If so, has Adams complied with the provisions of the contract on his part sufficiently to entitle him to a conveyance? If not, he is not entitled to decree for specific performance, and the land having been conveyed from Thompson to Shriver and Irey, their title must be held good with a decree canceling the deed from Adams to Riley.

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By the letter from Thompson to Adams, bearing date November 11, 1885, the proposition was made to Adams to sell him the property in dispute for the sum of \$1,000. The tract consisted of five acres. In his letter of October 28 Thompson stated that he would not care to sell for less than \$175 per acre, and in the postscript to the letter of November 6 he said that he would not sell for less than \$200 per acre, but that if that figure were offered he would be disposed to sell. Evidently with this in view he wrote the letter of November 11, 1885, fixing his price, which was \$1,000 for the five acres, or \$200 per acre. His terms for the payment of the \$1,000 were stated to be \$200 cash, \$500 in one year, and the assumption of the \$300 debt and mortgage due McShane. Nothing was said as to the character of the conveyance to be made, but the whole case shows that the execution of a warranty deed was contemplated. From this we conclude that it was his purpose to deduct the McShane mortgage from the purchase price, free the land from tax liens, and receive a part of the remainder in money and the balance in one year. This offer was unequivocally accepted by plaintiff in his dispatch of the 13th of November. But upon investigation it turned out that the mortgage debt to McShane was \$315 (three notes of \$105 each) instead of \$300, as supposed by Thompson. This \$315 was to be assumed by Adams and hence should be deducted from the agreed price. It also appears that there were unpaid taxes of \$3.25, which, though not delinquent, were a lien on the land. This, under the proposition contained in the letter of November 11, Thompson would have to pay. The taxes were properly deducted from the cash payment by Adams and the amount due upon the McShane mortgage over and above the \$300 from the \$500 payment due in one year; and therefore the remittance of money, note, and mortgage by Adams was in strict compliance with the terms of Thompson's offer. But the deduction of \$3.25 from the cash payment seems

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not to have been objected to by Thompson, for in his letter of November 17 he says, "the amount you have deducted for taxes not due until May will just about pay the interest due McShane at this time," and closes the letter by saying that he would let plaintiff have the land because he "wrote first and agreed to the terms." The first note for \$485, forwarded by Adams, did not contain a provision for the payment of eight per cent interest, but this was corrected by a new note sent by plaintiff in his letter of November 19th, and in which he also inclosed his note for \$15, which was so much more than he had agreed to pay. We are fully convinced that the correspondence constituted a contract for the sale of the real estate and that plaintiff complied with it on his part to the fullest extent.

But it is contended by appellant that there is no such description of the real estate in the correspondence as would entitle the purchaser to a decree for specific performance. The first letter from plaintiff to defendant refers to his (defendant's) lots in McShane's sub. (meaning subdivision). In the answer from defendant he refers to the five acre lot in the same subdivision. The same occurs in defendant's letters of November 6th and November 11th, and throughout the whole of the correspondence there is no question as to the identity of the property. Defendant had no other property in the subdivision referred to, and the correspondence was with reference to that owned by him. This was sufficient to admit parol evidence as to the description. (*Atwood v. Cobb*, 16 Pick. [Mass.], 227; *Hurley v. Brown*, 98 Mass., 545; *Nichols v. Johnson*, 10 Conn., 192; *Ogilvie v. Faljambe*, 3 Mer. [Eng.], 53; *Sanborn v. Nockin*, 20 Minn., 178.)

The next contention of appellants Shriver and Ireys is that they had purchased the property from Thompson prior to the alleged purchase made by plaintiff, and that as between them and plaintiff their equities were superior to those of plaintiff, and that he is not, as against them, en-

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titled to the decree of specific performance and cancellation of their deed.

It appears by the record that on the 5th day of November, 1885, Shriver wrote the following letter to defendant Thompson :

“OMAHA, NEB., Nov. 5, 1885.

“*E. H. Thompson, Esq., Yankton, Dak.*: DEAR SIR—
What will you take for your five acres in McShane's subdivision? Have a chance to sell it. Answer on receipt of this and oblige,

Yours truly,

“W. G. SHRIVER.”

We are unable to find any answer to this letter, but on the 11th of the same month Thompson sent the following to Shriver :

“YANKTON, D. T., Nov. 11, 1885.

“*W. G. Shriver, Esq.*: DEAR SIR—Yours of the 9th is at hand. I will take \$1,000 net for the lot, viz., \$200 cash, and remainder—\$500—in 1 year at 8 per cent, subject of course to the mortgage of \$300 and interest due John McShane. Your commission and other expenses attending sale to be paid by purchaser. Should I feel as I do now, a portion, say $\frac{1}{2}$ or $\frac{1}{3}$ of the \$500, could stand longer than 1 year, though I make no absolute promise, as I might need the money very much. The party you have in view can feel surer of getting the lot if he takes the lumber, as I am in receipt of a letter asking me to state my terms, on a proposition of \$200 per acre. The party who sold for \$800 made a mistake.

“Yours truly,

E. H. THOMPSON.

On the 12th of November, Shriver executed to Irey the following receipt:

“OMAHA, NEB., Nov. 12th, 1885.

“Received of H. B. Irey fifty (50) dollars, on account of purchase of lot 12 in John A. McShane's subdivision of the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of sec. 30, township 15, range

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13 east, sold him this day for \$1,000; \$200 cash, \$500 in 1 year, and subject to a certain mortgage of \$300, favor of John A. McShane, also interest and '85 taxes.

“W. G. SHRIVER, *Agt.*”

On the same day he wrote Thompson the following letter:

“OMAHA, NEB., Nov. 12, 1885.

“*E. H. Thompson, Esq.*: DEAR FRIEND—Yours of the 11th inst. at hand. My man will take your five acres at your proposition—\$200 cash, \$500 in 1 year, subject to McShane \$300 mtg.—at \$1,000. I could not get any commission out of him, and if you will allow my small commission out of a \$1,000 it will be very acceptable. I will enclose deed, which you will find out, giving your full name and wife, if any, and go before a notary public and have properly acknowledged, and send to me, on receipt of which I will remit you first payment.

“Will have mtg. properly executed, bearing interest at 8% on \$500 for one year. The party is out of town, but left instructions and money with me. Don't think we will have any trouble with him about the lumber. If so, can sell to some one else, as there is one or two parties out in that neighborhood who will build this winter, and can sell it to them, as they will have to have lumber. Your 5 acres is well sold. Don't you want to buy something else with your money in O.? Return deed at once, and oblige,

“Y. T.,

W. G. SHRIVER.”

On the 16th of November, and after the receipt by him of plaintiff's dispatch, and by the Yankton bank of the check, note, and mortgage, sent it by plaintiff, he wrote and sent Shriver the following:

“YANKTON, D. T., Nov. 16, 1885.

“*W. G. Shriver, Esq.*: DEAR SIR—When your papers arrived the property was considered sold, as I received a telegram from a party informing me he would take the lot

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on the terms stated. He has check, deed, &c., here at bank, which I refuse to fill up unless he makes some alterations. If you can do anything about that lumber I would like you to do so as soon as possible, as I will have to move it from the land if I complete the papers that are here.

"Yours truly, E. H. THOMPSON."

On the 19th Shriver sent a telegraphic dispatch to Thompson, the substance of which was: "My man will take lumber at \$70 if he gets land. My sale was first. Ans. by wire;" and to which Thompson answered by the following telegram:

"YANKTON, D. T., 19.

"*W. G. Shriver, Frenzer Block*: Accepted, provided seventy dollars for lumber, cash payment, and necessary papers are sent immediately to First National Bank, Yankton, and paid me when papers are completed.

"E. H. THOMPSON."

This was answered by the following dispatch from Shriver of the same date:

"Terms satisfactory; will send money and papers next mail."

The deed from Thompson to Irey was executed and acknowledged on the 24th of the same month and on the same day Irey and wife conveyed to Shriver, and also upon the same day Shriver and Sallie E. Irey, by H. B. Irey, her agent, entered into an agreement in writing whereby Shriver agreed to sell to Mrs. Irey the undivided half of said property for the sum of \$537; \$130 of which was paid in cash, the remainder to be paid by the assumption of one-half of certain mortgage liens on the land, amounting to \$815, Shriver to make the deed to Irey as soon as the property was platted into city lots. By reference to the telegram from plaintiff to Thompson of November 13th and Thompson's letter of the same date in reply, and by which the contract of sale was agreed to in all particulars,

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it is very evident that plaintiff was first in time and therefore first in right; for it could not be successfully contended that any contract was made between Thompson and Ireys—or Shriver—prior to the 19th, when the telegraphic dispatches above copied passed between them, and at that time Shriver had full notice—received by Thompson's letter of the 16th—of plaintiff's right.

There other questions presented by appellee, but they need not be noticed. The decree of the district court was right and is affirmed.

DECREE AFFIRMED.

COBB, J., concurs.

MAXWELL, J., dissenting.

I am unable to concur in the opinion of the majority of the court, and as in my view a judge dissenting should give the reasons therefor, I will briefly state why I cannot acquiesce in the decision.

It will be seen from the statement of facts in the opinion of Chief Justice REESE that the proposition of Thompson to Adams was that the purchaser should assume the McShane mortgage—not \$300 of that mortgage—and should pay him (Thompson) \$200 cash, and \$500 in one year. Mr. Adams in a general way *said* that he accepted these terms, but he has never yet offered to comply therewith. We find him sending a mortgage for \$485 due in one year, without interest. When this was refused he sent a mortgage for \$485, which was to draw interest, and an independent unsecured note for \$15. If it was necessary to secure the note for \$485, it would seem to be equally so to secure the \$15. In any event it was not a compliance with the proposition and this court cannot say that it is, because it is not so in fact. Suppose Mr. Adams had sent a note for \$499, would any court say the remainder was but a trifle, and that is a substantial compliance with the contract? There may be cases where equities have at-

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tached in which the failure to tender a small sum like one dollar, or even fifteen dollars, would not defeat the plaintiff's rights, but the facts must be different from those in the case at bar. Here the plaintiff stands upon the naked contract and claims that he has fully tendered performance of the conditions. The record shows conclusively that he has not and that he is not entitled to recover.

SIMON OBERNALTE V. JONATHAN EDGAR.

[FILED NOVEMBER 26, 1889.]

1. **Leading Questions: DISCRETION OF TRIAL COURT.** It is in the discretion of the judge presiding at a trial to determine whether a question is objectionable as leading, and a judgment will not be reversed for error in that respect, except in a case where there is an abuse of discretion. (See *Walker v. Dunsbaugh*, 20 N. Y., 170.)
2. **Adverse Possession: OCCUPATION UNDER MISTAKE IS.** If one, by mistake, inclose the land of another, and claim it as his own, to certain fixed monuments or boundaries, his actual and uninterrupted possession as owner for the statutory period will work a disseisin and his title will be perfect. (*Levy v. Yerga*, 25 Neb., 764.)

ERROR to the district court for Cass county. Tried below before CHAPMAN, J.

J. H. Haldeman, for plaintiff in error:

Leading questions, on direct or redirect examination, are not permissible. (1 Greenleaf, Ev., sec 434; *Smith v. Shoemaker*, 17 Wall. [U. S.], 630.) The evidence shows that the land was occupied through mutual mistake, and in this regard the case differs from *Tex v. Pflug*, 24 Neb., 666; hence the possession was not adverse. (*Alexander v. Wheeler*, 69 Ala., 332; *Howard v. Reedy*, 29 Ga., 152; *Grube v. Wells*, 34

28	70
33	570
28	70
31	810
28	70
40	256
28	70
47	94
28	70
49	376

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la., 148; *Skinner v. Crawford*, 54 Id., 120; *Winn v. Abeles*, 35 Kan., 85; *Abbott v. Abbott*, 51 Me., 575; *Hitchings v. Morrison*, 72 Id., 331; *Ricker v. Hibbard*, 78 Id., 105; *St. Louis University v. McCune*, 28 Mo., 431; *Thomas v. Babb*, 45 Id., 384; Angell on Limitations, sec. 390.) To be adverse, possession must be hostile. (*Kirk v. Smith*, 9 Wheat. [U. S.], 241; *Turney v. Chamberlain*, 15 Ill., 273; *Sedgwick & Waite*, Title, sec. 749; *Tyler*, Ejectment, 860.) Failure to submit the question of hostility in an instruction, is error (*Thompson v. Felton*, 54 Cal., 547; *Sparrow v. Hovey*, 44 Mich., 63); and is not cured by alluding to the question in another instruction. (*Wasson v. Palmer*, 13 Neb., 376.)

H. D. Travis, contra:

The questions complained of as leading were not prejudicial. Possession under a mutual mistake is adverse. (*McKinney v. Kenny*, 1 A. K. Marsh. [Ky.], 460; *Smith v. Morrow*, 5 Litt. [Ky.], 210; *Hunter v. Chrisman*, 6 B. Mon. [Ky.], 463; *Tex v. Pflug*, 24 Neb., 666; *Enfield v. Day*, 7 N. H., 457; *Hale v. Glidden*, 10 Id., 397; *Crary v. Goodman*, 22 N. Y., 170; *Yelzer v. Thoman*, 17 Ohio St., 130.) Moreover, neither Obernalte nor his grantors occupied the land under mistake.

COBB, J.

This proceeding in ejectment is brought on error from the district court of Cass county.

The plaintiff alleged in the court below that he has a legal estate in and is entitled to the immediate possession of a piece, or strip, of land off the south side of the south-east quarter of section 19, township 11, range 11, in said county, being about seventy-three links wide at the west end of said strip, and running from thence east, angling to a point at the southeast corner stone of said section, and

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containing about one and one-half acres; that the defendant unlawfully keeps him out of the possession thereof, and prays judgment of possession, etc.

The amended answer of the defendant denies each and every allegation of the plaintiff.

II. That he has open, notorious, exclusive, continuous, and peaceable possession for more than ten years next preceding the commencement of this suit, and is the owner in fee simple of the land described.

III. That the highway running east and west between the lands of plaintiff and the southeast quarter of section 19, township 11, range 11 east of the 6th P. M., in said county, and the lands of Jonathan Edgar on the south have been used by all parties owning and controlling said lands, and the owners of adjoining lands, for the last eighteen years, immediately preceding the commencement of this suit, as the true line and boundary between the lands of plaintiff and defendant, and that the plaintiff is thereby estopped to claim the lands described, etc.

There was a trial to a jury, with a verdict for the defendant. The plaintiff's motion for a new trial being overruled, judgment was entered on the verdict for defendant's costs, and the plaintiff's bill of exceptions was allowed and settled on the following assignments of error:

1. The court erred in permitting the defendant and Beach and Allen to testify over objection of plaintiff in relation to the boundary lines of sections 19 and 20, in township 11, range 11, in said county, and the boundary and location of the strip in controversy and the improvements supposed to be put thereon, said witnesses not having shown themselves competent to so testify.

2. In permitting leading questions to be put and answered by defendant and Beach and Allen, clearly suggesting the answer on material points.

3. In giving on his motion instructions to the jury numbered 1, 2, 3, 4, and 5.

4. [In giving instruction 7, asked by the defendant.

5. In refusing to give instructions 1, 2, 3, 4, 5, 6, 7, 8, and 9, asked by the plaintiff.

6. The verdict is not sustained by sufficient evidence and is contrary to law and the evidence adduced.

7. In overruling the motion for a new trial.

The first error relied on, and argued in the brief of the plaintiff in error, is that defendant, and other witnesses called by him, when on the stand in the court below, were permitted by the court, over the objection of the plaintiff, to answer leading questions put to them by defendant's counsel.

As above stated, the defendant had pleaded in answer, amongst other matters of defense, "that he has had open, notorious, exclusive, continuous, and peaceable possession of the land in controversy for more than ten years next preceding the commencement of the suit." The defendant, Jonathan Edgar, having testified that he was the defendant in said cause; that he lived on section 30 until quite recently, but then lived at Wabash; that he went onto that part of said section and took it up as a homestead in 1869; that he went onto it in 1870, and had occupied it ever since, his examination was continued as follows:

Q. What, if any, improvements have you made, and what have you done on the strip of land in controversy in this case?

Over objection he answered:

"In the spring of 1870, I broke out my hedge rows, and in the spring of 1871 I put out my trees."

Q. State where you put them.

A. Right along the north line of section 30.

Q. What quarter of the section?

(Over objection.) A. The northeast part of that section.

Q. How much land did you own in that part of the section?

A. Forty acres.

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Q. You are sure that is on the land which Mr. Obernalte claims from you, are you?

A. Yes, sir.

Q. Have you stated all of the improvements that you have made on that land now?

A. That is all.

Q. Have you ever recognized the plaintiff in this case as having any interest in this land in any manner? (Objected to, as leading, incompetent, and irrelevant. Overruled, with exceptions.)

A. No, sir.

Q. When did he first claim an interest in this land?

A. I think it was about two years ago.

Q. In 1886?

A. Yes, sir.

H. C. Beach, a witness on the part of the defendant, testified: "That he resides on the northwest quarter of section 30, 11, 11; that he homesteaded the north half of said quarter, he thinks in 1867, and has lived there continuously since 1868; that he has known Mr. Edgar, the defendant, ever since he has lived there."

His examination continued as follows.

Q. State, if you know, how long Mr. Edgar has resided there on the northeast quarter of section 30, 11, 11? (Objected to, as incompetent and immaterial. Overruled, with exceptions.)

A. I believe he came there in 1870; about the year 1870 I think it was, and he was living there until this fall, probably two or three months ago, when he moved to Wabash.

Q. Do you know the land in controversy in this suit, described in the petition as a piece or strip of land off of the south side of the southeast quarter of section 19, 11, 11, Cass county, Nebraska, or being about seventy-three links wide at the west end and running from thence east to a point at the southeast corner?

A. Yes, sir.

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Q. State, if you know, what, if any, improvements Mr. Edgar made on that land. (Objected to, as incompetent, immaterial, and the witness has not shown himself to be a surveyor. Overruled, with exception.)

A. According to the survey I know he has some improvements there in the way of trees, buildings, and other improvements—general improvements.

Q. According to the survey you say you know; state what you mean. (Objected to, as incompetent, immaterial, and irrelevant. Overruled, with exceptions.)

A. I mean the survey that I have always known.

Q. By the court: What was your knowledge derived from?

A. My knowledge was from the stone that we had there—from the corner stone, and from the road. (The plaintiff moves to strike the answer out. Overruled, and exception taken.)

Q. Go on, and state further about that matter, according to the survey you knew; state what you mean. (Objected to, as immaterial, incompetent, and irrelevant. Overruled, and exception taken.)

A. I did.

Q. State what you know about the boundary line of the northeast quarter of section 30, and the southeast quarter of section 19? (Objected to, as above. Overruled, and exception taken.)

A. In 1869, prior to that, Mr. Smith owned a portion of the land south of me, and we wanted to divide some timber, and consequently we wanted to get a surveyor to settle the dispute of the timber. I owned the north half, and he the south half, and we wanted to get a line surveyed through there, and settle this question, to which the timber belonged, on a certain line; he claimed further north, and I claimed further south.

Q. What do you know about this road, and this boundary line?

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A. We got him to survey out our land at that time, and he surveyed it out, and he run to this stone, that is at the northwest corner of this forty across the land that Mr. Edgar owns, and also the quarter corner between sections 19 and 30, he run there to this stone, and he said that that was a government stone at that time, and I recognized it as such ever since. It has a mark on it, a government mark on it.

(The defendant moved to strike out that part of the witness's testimony wherein he describes the government line and stone, the witness not having shown himself competent to testify to the fact. Overruled, exception taken.)

Q. A competent surveyor said it was?

A. Yes, sir; I took A. B. Smith's word for it. * * *

Q. In your testimony you speak of improvements on the southeast quarter of section 19; do you mean to include those improvements north of the road?

A. Yes, sir.

Q. Then this strip of land that is in controversy is south of the road?

A. Yes, sir.

Q. And you speak of this as being in section 30? (Objected to, as leading. Overruled; exception.)

A. Yes, sir.

Q. Now, about that road; has that been treated by the parties there as a boundary line between the southeast of 19, and the northeast of 30, or do you know?

A. Yes, sir.

Q. Now, state what you know. (Objected to, as leading, etc. Overruled; exception.)

A. I know that all parties that had anything to do with the land have recognized that corner as the corner in all farming.

B. F. Allen, a witness on the part of the defendant, stated that he resides on section 25, on the southeast quarter 11, 10; that he is acquainted with Mr. Edgar, defend-

ant; has known him probably for thirty years. Thinks that he homesteaded the northeast quarter of section 30, 11, 11, in the winter of 1869, and went onto it in the spring of 1870 to live; that he has been there ever since, until within a few months.

I quote from the bill of exceptions:

Q. He was there the 1st of April, 1887, was he not?

A. Yes, sir.

The foregoing contains the several items of testimony specified under the said assignment. It cannot be denied that in framing some of his questions defendant's counsel approached very near the danger line, but I do not think that there was error, certainly not reversible error, on the part of the trial court in permitting any question objected to to be answered. In deciding whether a given question put to a witness is open to objection, as being leading, or not, much depends upon the nature of the subject of the inquiry. For example, the defendant in the case at bar, when testifying as a witness in his own behalf, having stated that in a certain year he homesteaded a certain quarter section of government land, might properly be asked by his counsel to state whether he built the house and set out the trees upon the tract, and upon a narrow strip of land adjoining that tract, which were admitted by all parties to be there, as a matter of fact, although such question was put in such a form that it might be answered by "yes" or "no."

This was an action of ejectment for a narrow strip of land one-half mile long, seventy-three links wide at one end and running to a point at the other. The plaintiff in his petition charges the defendant with keeping him out of the possession of this strip of land. The defendant in his answer in effect admits this charge and claims that he not only was then in the possession of said land but had been in such possession continuously for a sufficient length of time to give him the title thereto, under the statute. Had

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the defendant not alleged in his answer that he was in possession of this strip of land it would have been incumbent on the plaintiff to prove that fact before he could recover, be his title ever so clearly established. But this fact, upon whomsoever the duty of proving it might devolve, must from its very nature have been one of neighborhood notoriety, concerning which there could be comparatively no danger of false testimony. The objections to leading questions put to a party's own witness consists chiefly in the danger of their leading to perjury by means of their informing the witness what the party calling him desires him to testify to. In cases turning on questions of fact, and where such matters of fact are of such a nature as to render perjury possibly successful, the rule of law prohibiting leading questions by the party calling a witness should be strictly enforced. Yet in what cases and under what circumstances leading questions may be allowed to be put to a witness by the party calling him, is a question resting in the sound discretion of the court, and, except where there is an abuse of discretion, cannot be assigned for error. (See *Walker v. Dunspaugh*, 20 N. Y., 170, and *Gunter v. Watson*, 4 Jones L. [N. C.], 455; cited in note to 1 Greenl. Ev., sec. 435.)

The second point of error argued is that the court erred in permitting defendant's witnesses to testify in regard to lines, boundaries, and corner stones, said witnesses not being shown to be surveyors, etc. In answer to this objection it may be said that there was no dispute between the parties as to the true boundary lines, or corners, as they originally existed, or were established and run by the United States surveyors, between the southeast quarter of section 19 and the northeast quarter of section 30. It was the northern boundary line of the defendant's improvements and possessions that was in dispute. This boundary appears to have been marked by a public road. It required no professional skill or mathematical knowledge to qualify

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a witness to testify as to the existence of this road, and these improvements, nor to their relative position to each other, nor indeed did it, to testify as to the existence of the corner stones, and the relation thereto of the road, and improvements respectively.

Upon the trial the following instructions were given to the jury by the court upon its own motion :

"1. The plaintiff in the case brings this action under our Code of Civil Procedure for the recovery of a strip of land, being about seventy-three links wide at the west end of said strip, thence east angling to a point at the southeast corner of section 19, town 11, range 11, in Cass county, containing one and one-half acres in said section, and alleges that he has a legal estate and is entitled to the possession of said strip of land and that defendant unlawfully keeps him out of the possession of the same. To this petition of plaintiff the defendant answers alleging that he is the owner seized in fee simple of said real estate, also that he has been in the open, notorious, exclusive, continuous, and peaceable possession of said real estate for more than ten years last past before the commencement of this action. Upon this petition and the answer of the defendant issue is joined. You are instructed that the deeds and proper title evidenced by the records of Cass county which have been introduced in evidence before you are sufficient to vest the title to the southeast quarter of section No. 19, in township 11 north, of range 11, 6th P. M., in Cass county, in Simon Obernalte, the plaintiff, unless you find that some portion thereof has been in the actual, open, continuous adverse possession of the defendant for at least ten years next immediately preceding the commencement of this action.

"2. You are further instructed that the plaintiff's title to a strip of land described in his petition being denied by defendant in his answer, the burden of proof is upon the plaintiff to satisfy the jury by a fair preponderance of the

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evidence submitted to you that plaintiff is the owner of and entitled to the possession of said parcel of real estate. It is not sufficient to entitle plaintiff to a verdict in this case that said strip of land is embraced in the title deeds held by him to section nineteen, but he must show, in addition thereto, that he is entitled to the possession of the same, and if you find from the evidence that defendant, Jonathan Edgar, has been in actual, continued, and notorious adverse possession of the real estate in controversy, claiming the same as his own against all persons for the full extent of ten years, with valuable improvements upon the same, this, you are instructed, would constitute him the owner of the same and he, not the plaintiff, would be entitled to the possession of said strip of land.

"3. You are instructed that the burden of proof is upon the defendant to establish his adverse possession of said real estate for said period of ten years.

"4. You are further instructed as a matter of law that adverse possession of real estate in order to vest the title thereof in adverse claimant must be actual, continued, and notorious adverse possession, with claim of the same as his own against all persons for the full extent of ten years; and that if you find from the evidence in this case that the defendant entered upon the land in controversy, planting forest and fruit trees thereon, claiming as his homestead, and erecting buildings thereon, and remaining in possession of said real estate for ten years prior to the commencement of this action by the plaintiff, that such occupancy would constitute that adverse possession under our statute which would vest the right of possession and title to said real estate in defendant, and your verdict, should you so find, should be in favor of the defendant.

"5. The court instructs you that an offer to compromise a suit is no admission of the plaintiff's right."

The following instructions were given at the request of the defendant:

"6. The jury are instructed that the burden of proof is upon the plaintiff to prove that the land in controversy belongs to the southeast quarter of section 19, town 11, range 11 east.

"7. The court instructs the jury that by the laws of this state if a person goes into the possession of real estate under a claim of right, and continues in the open, exclusive, hostile, and uninterrupted possession of the premises in controversy under the claim of ownership for the period of ten years, he will in law be deemed the true owner thereof. That if the real owner of lands permits another to hold possession of the land, claiming it as his own, and to continue such possession openly, publicly, under claim of ownership for a period of ten years or more, such possession will ripen into a title in the possessor and ever after bar the real owner from taking possession, and you are instructed that the actual possession of land may arise in many different ways, and in any of the different ways of improving it which are open and notorious in their character, which show an intention to appropriate to some useful purpose—that is, by enclosing by fence, erecting buildings, planting groves or trees—going to indicate the appropriation of the property of the persons claiming to own it.

"To constitute adverse possession it must further appear that what the defendant did on the land was not with the permission of the owner but was done under a claim of right in himself and recognizing no right in the real owner."

The instructions to the jury asked by the plaintiff and refused are as follows:

"2. The jury are further instructed that possession and occupation by inadvertence or mistake, without any intention to claim title, is not sufficient to vest the title in the person occupying the land by adverse possession, and although the jury believe from the evidence that the defendant, more than ten years before the commencement of this action, set out or planted trees, or otherwise improved the

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strip of land in question, this alone does not show adverse possession. To constitute adverse possession it must further appear from the evidence that what the defendant did on the land was not done through inadvertence or mistake, but was done under a claim of right in himself and in hostility to the right and possession of the owner.

"3. The jury are instructed that the burden of proof is on the defendant to prove adverse possession as explained in these instructions. That adverse possession sufficient to defeat the legal title must be hostile to the legal owner, and so continue uninterruptedly for ten years. It must be open and of such character as to show clearly that the occupant claimed the land during said time as his own, and all of these things must be proved by a preponderance of evidence.

"4. Intention on the part of the defendant is material and essential and must be shown by a preponderance of the evidence to create a title in the defendant by adverse possession to the land in question, and if the jury believe from the evidence that the defendant took possession of said land inadvertently or by mistake, or with the knowledge and consent of the owner, then they must find for the plaintiff.

"8. The court instructs the jury that where one person is shown to have legal title to land, and another person is shown to be in possession of the land, if there is no evidence to the contrary, the law presumes that such possession has been with the consent of the owner, and not in hostility to his rights, and if the person in possession sets up a claim to the land by virtue of such possession, the burden of proof is on him to show affirmatively, by a preponderance of the evidence, not only that he has been in possession, but it must further appear, from a preponderance of the evidence, that such possession was commenced and continued in hostility to the true owner and under the claim of right as against him, and these matters must be shown by clear and affirmative proof of such facts as shown, that such possession was

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taken and continued in hostility to such owner; they cannot be made out by inference without such proof."

By giving the instructions above copied as given, and refusing to give those above copied as refused, the court decided the principal question of law involved in the case, and decided it in accordance with at least one decision of this court. The point was fully argued in the case of *Tex v. Pflug*, 24 Neb., 666, though not expressly decided. But in the case of *Levy v. Yerga*, 25 Id., 764, it was again presented and expressly decided, following the case of *Yelzer v. Thoman*, 17 O. S., 130.

In the case at bar it is plain from the evidence that at or before the time of the settlement of the defendant upon the northeast quarter of section 30, a stone, which had been placed to mark and designate the northwest corner of said quarter section and the southwest corner of the southeast quarter of section 19, the land of the plaintiff, had by some means been removed to a point about seventy-three links north of its true position; that a neighborhood road was made by travel between the said tracts of land, along and upon the false line as thus designated by the new position of said stone; that the defendant, in improving, setting out forest and fruit trees upon, and cultivating said northeast quarter of section 30, extended the same northward to the said road, doubtless in the belief that said road marked the true northern boundary of his land, and occupied the same by such improvements and cultivation for more than ten years before and up to the time of the commencement of the action. This possession of the defendant contained all the elements necessary to constitute adverse possession under the statute and constituted a defense to the plaintiff's action.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

WILLETT L. IRISH, APPELLANT, V. N. M. LUNDIN ET
AL., APPELLEES.

[FILED NOVEMBER 26, 1889.]

Liens: VENDOR: MATERIAL MAN. A purchased a lot from B for \$800, paying one-fourth of the price cash in hand, the remainder to be paid in ninety days. The contract not being reduced to writing, A thereupon took possession of the lot and before the expiration of the ninety days had erected a dwelling house thereon. The mechanics and material men, who had contributed to the erection of the dwelling, thereupon filed separate claims, each to obtain a lien on said property, and thereafter brought an action to foreclose the liens. A failed to pay the \$600 purchase money. *Held*, That the property would be sold as upon execution and the proceeds applied, first, to the payment of the amount due on the contract of purchase, with legal interest, and, second, to the payment of the liens on said property, the remainder, if any, to the purchaser; but in case there was not sufficient after paying the purchase price to satisfy the liens, then the lienholders are to be paid *pro rata*.

APPEAL from the district court for Douglas county.
Heard below before DOANE, J.

Winfield S. Strawn, for appellant:

Ch. 54, Comp. Stats., gives the material man a lien upon buildings "and" the land on which they stand. If the lien does not attach to the buildings as such, but only because they are a part of the land, the words in the statute preceding "and" would be meaningless surplusage, and such a construction will not, if it can be avoided, be given to a legislative act. There is no provision making the lien dependent on the land or title thereto. Such a lien can be enforced against a building erected on the land without authority. (*Judson v. Stephens*, 75 Ill., 255.) The mechanic's lien act does not exclude the lien which a material man or laborer has always had in equity, but affords a cumulative

28	84
31	689
28	84
53	473

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remedy. Under the doctrine, therefore, either of mechanic's or of equitable liens, appellant is entitled to a decree.

McHugh & Christopherson, for appellee Wilson (*A. C. Wakely*, for appellees King *et al.*; *Holmes & Wharton*, for appellees Dow and McIver; and *Kennedy & Learned*, for appellee Dunmire, filed no briefs):

There can be no lien of the kind claimed upon *any* property, unless the material is furnished under a contract with the owner. Such a contract in this case would have been required to be in writing, and the mere payment of a portion of the purchase price (should it be conceded that the \$200 was such) will not take a parol contract for the sale of land out of the statute of frauds. (*Poland v. O'Conner*, 1 Neb., 50; *Mushrush v. Devereaux*, 20 Id., 49.) The receipt given by appellee Wilson does not meet the requirements of the statute. (Reed, Statute of Frauds, sec. 398; Brown, Statute of Frauds, sec. 385; *McWilliams v. Lawless*, 15 Neb., 131; *Barton v. Patrick*, 20 Id., 654; *Holmes v. Evans*, 48 Miss., 247; *Williams v. Morris*, 95 U. S., 444.) Especially is this true, as the receipt was given to Gibson in a transaction distinct from that with Lundin, and was not delivered to the latter nor brought to his knowledge. (*Steele v. Fife*, 48 Ia., 99; *Johnson v. Brook*, 31 Miss., 17.) Possession, in order to constitute part performance, must be taken with the knowledge and consent of the vendor. (Waterman, Spec. Perf., secs. 261, 272.) Appellant has no lien in equity such as is contended for, since liens of the sort claimed are purely creations of statute. (Jones on Liens, sec. 1184; Phillips, Mechanics' Liens, page 4, sec. 2; *Ellison v. Jackson, etc., Co*, 12 Cal., 542; *Spencer v. Barnett*, 35 N. Y., 914; *Davis v. Farr*, 13 Pa. St., 167; *McCoy v. Quick*, 30 Wis., 521.) Counsel for appellant confuses the common-law lien of the artisan upon chattels with the statutory lien of the mechanic on a building. No lien attaches to a building erected on land with-

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out consent of the owner. (Jones on Liens, sec. 1246; *Stevens v. Lincoln*, 114 Mass., 476; *Wilkins v. Litchfield*, 69 Ia., 465 [29 N. W. Rep., 447].) Under statutes similar to ours it has been held that there is no lien upon the buildings distinct from that upon the land. (*Belding v. Cushing*, 1 Gray [Mass.], 576; *Stevens v. Lincoln*, 114 Mass., 476; *Coddington v. Dry Dock Co.*, 31 N. J. L., 477.)

MAXWELL, J.

This action was brought in the district court of Douglas county by the plaintiff against the defendant to foreclose a mechanic's lien.

On the trial of the cause the court found the issues in favor of the defendant Wilson and dismissed the action.

The petition is substantially in the ordinary form.

Maria Wilson filed a petition to intervene, which being sustained, she filed an answer, in which, after setting out her purchase of the lot in question, she alleges: "That on, to-wit, the thirty-first day of January, A. D. 1888, George E. Gibson, the agent of said defendant Maria Wilson, at the county and state aforesaid, did, as agent of said last named defendant, make an oral, verbal contract to and with said defendant N. M. Lundin for the sale of all her right, title, and interest in said premises to said N. M. Lundin; that such contract was oral and rested entirely in oral agreement; that no note or memorandum thereof was ever reduced to writing or signed by any one; that said contract could not and did not vest or convey to said N. M. Lundin any right, title, or interest in or to said premises; that said N. M. Lundin did not at any time have possession or own any right, title, or interest in or to the said premises, and that said N. M. Lundin has not now any right, title, or interest in or to said premises.

"Said defendant Maria Wilson, further answering, says

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that in and by the terms of said oral and void contract so entered into by said George E. Gibson, her agent, and said N. M. Lundin, it was agreed that the said contract should become binding upon the parties thereto only in case said N. M. Lundin should, in ninety days from said last named date, make a certain payment to said George E. Gibson as the said agent of this defendant; that by the said contract it was provided that if said N. M. Lundin should fail, neglect, or refuse to make such payment in said time, then and in that case he was not to acquire or have any right, title, or interest in or to said premises. This defendant says that the said N. M. Lundin did fail, neglect, and refuse, and has wholly failed, neglected, and refused to make such payment in said time, or at any time thereafter; that said payment has not been made nor has any part thereof been paid, but that on the contrary said defendant N. M. Lundin has absconded and left the county and state aforesaid; and said defendant says that said defendant N. M. Lundin did not and has not acquired any right, title, or interest in or to said premises by said contract."

She also denies that she, or her agent, delivered possession of said lot to Lundin.

The testimony tends to show that about January 31st, 1888, one George E. Gibson, a real estate agent in Omaha, and duly authorized to sell the lot in question, negotiated a sale of the same to the defendant N. M. Lundin for the sum of \$800; one-fourth of the sum was paid at the time of the purchase and the remainder to be paid in ninety days from that date.

To obtain the \$200 part payment, Lundin and one Roos executed a note to Gibson, secured by a mortgage on real estate owned by them, and he (Gibson) either loaned them the money or obtained it on those securities from a loan company for which he was agent. The question how the money was procured does not seem to enter into the case, as it was in fact obtained and paid upon the contract for the

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purchase of the lot. This money has been retained, and it is claimed by the seller that Lundin had a mere option to purchase and upon his failing to pay the remaining \$600 the payment already made was forfeited and also all of Lundin's rights therein.

The attorneys for Wilson contend that this being an oral contract, and Lundin not having possession of the lot, the contract cannot be enforced, and a large part of their brief is taken up with the citation of authorities to sustain that proposition.

As a matter of fact, however, Lundin did immediately enter into possession of the lot in question and erected a house thereon of the value of \$700 or \$800 and the mechanics' liens in suit were created by the erection of said building. The work was nearly completed before the expiration of the ninety days from January 31st, 1888. Lundin seems to have left the state and has failed to pay the balance due on the lot or to the mechanics and material men for the erection of the house. This house is now in the possession of Wilson. She seems to claim the same free from any liens, etc. It is gravely urged that for the privilege of an option on the purchase of a lot more than two miles north of the post-office in the city of Omaha, and for which, so far as appears, the full value was agreed to be paid, Lundin actually paid \$200 for the privilege of purchasing the same in ninety days. It is not claimed that he had any property adjoining or near that place that would be enhanced in value by the purchase. The sale was made, therefore, we infer, at the full value of the lot and the \$200 paid as one fourth of the consideration therefor. To that extent, therefore, Lundin has an interest in the lot.

Forfeitures are odious in law. (*Dickenson v. State*, 20 Neb., 81; *Estabrook v. Hughes*, 8 Id., 501; *Hibbeler v. Gulheart*, 12 Id., 530.) In the latter case it is said, after showing that the lessee was in default: "It was evidently the intention of the legislature, in passing the law con-

taining these provisions, to hold the purchasers and lessees of the school lands to the strict performance of the terms of their obligations to the state. And while by the terms of the law all delinquents were limited to thirty days from the receipt of notice of such delinquency in which to remove the same by payment, yet we think it was the policy of the law to allow them to do so at any time before the commencement of suit to dispossess them by the prosecuting attorney, as provided for in the section. While the lessee is in possession, and not proceeded against in the manner provided by law, he is presumed to have rights, and these rights could only be cut off by the method pointed out in the name of the people, and not by proceedings moved by and in the name of an individual designing to become the purchaser or lessee, or otherwise. While the state can have no preferences as between different citizens, yet, as the law does not favor forfeitures, it will always favor the removal of delinquencies, on the part of those already its lessees and in possession, rather than the forfeiture of their rights to make room for others." This we regard as a correct statement of the law so far as it applies to a purchaser of real estate in possession, where he has made a considerable payment on the land and has a subsisting interest therein.

While in particular cases, by reason of peculiar circumstances, it is necessary to sustain a forfeiture, yet where any considerable portion of the purchase price of real estate has been paid and possession taken under the contract, the purchaser has an equity in the premises to the extent of the money paid by him, and it is gross injustice to permit the seller to retain this money and also the property free from any claim of such purchaser; and particularly is this true where, by reason of such forfeiture, creditors of the purchaser will be deprived of the amount due them. In an ordinary case this cannot be permitted. The seller is entitled to the price of his property as agreed upon, and the

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purchaser, upon the payment of such price, is entitled to the remainder. If, however, lawful liens are filed on the interest of such purchaser, as in this case, they must first be satisfied out of the amount due the purchaser before any part of the surplus will be paid to him. The judgment of the district court is reversed, the property is directed to be sold as upon execution, and out of the proceeds of said sale shall be paid, first, the amount due upon the contract of purchase, with lawful interest; and second, the several liens of the parties to this action are to be paid—the surplus, if any, to be paid to Lundin. In case the sum remaining after paying the amount due on the contract of purchase is not sufficient to pay all the lien holders in full, then said sum is to be applied *pro rata* among said lien-holders.

JUDGMENT ACCORDINGLY.

THE other judges concur.

FRANKLIN P. BONNELL V. COUNTY OF NUCKOLLS
ET AL.

[FILED NOVEMBER 26, 1889.]

County Bonds: STARE DECISIS. The questions presented are the same as in *Baird v. Todd* and *Jameson v. Dickson*, recently decided [27 Neb., 782], and objections to the court house bonds of Nuckolls county are overruled.

ORIGINAL application for injunction.

Leese, Stewart & Rose, for plaintiff.

Mason & Whedon, C. S. Johnson, and S. A. Searle, contra.

MAXWELL, J.

This is an action to enjoin the defendant from issuing certain county bonds for the erection of a court house in said county, upon the ground that such bonds are illegal and void. The grounds of the alleged illegality are, first, that the "act to amend the second subdivision of section twenty-five, chapter eighteen, of the Compiled Statutes of Nebraska of 1887, in relation to county buildings, and officers, and to repeal said second subdivision," approved February 26, 1889, is unconstitutional for the reason that its title is insufficient and in violation of the constitution, that no bill shall contain more than one subject, and the same shall be clearly expressed in its title; and second, that the taxes to pay the interest on said bonds, together with the taxes for ordinary county revenue, will exceed fifteen mills on each dollar of valuation, and hence are in violation of the constitution. Both of the questions presented were decided by this court in *Baird v. Todd* and *Jameson v. Dickson*, 27 Neb., 782. We regard those decisions as correct, and they are decisive of this. The taxes in question being valid, the action is dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

28	91
29	568
98	91
50	451

WILLIAM BELCHER V. JOHN M. SKINNER.

[FILED NOVEMBER 26, 1889.]

1. **Continuance: WANT OF MATERIAL EVIDENCE.** Under the provisions of section 960 of the Code a party desiring a continuance of a cause for a period not exceeding thirty days is entitled to such continuance if he "prove by his own oath or other-

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wise that he cannot, for want of material evidence which he expects to procure, safely proceed to trial."

2. ———: AFFIDAVIT. The oath, if in the form of an affidavit, may be substantially in the words of the statute, and it is unnecessary to state the purport of the testimony which the moving party supposes he can procure.

ERROR to the district court for Loup county. Tried below before HARRISON, J.

A. S. Moon, for plaintiff in error:

Mere statements under oath, or conclusions of a party, are not proof. (2 Bouvier, Law Dict. [15th Ed.], 748; Greenleaf, Ev. [14th Ed.], 1; *Jameson v. Butler*, 1 Neb., 118; *State, ex rel. Barnes, v. Thatch*, 5 Id., 96; *Ingalls v. Nobles*, 14 Id., 274.) The granting of a continuance is discretionary with the trial court. (*Holt v. State*, 11 Ohio St., 691, and cases *supra*.)

No appearance *contra*.

MAXWELL, J.

This action was brought by the plaintiff in the county court of Loup county, in March, 1889, and summons duly issued and served on the defendant. On the return day of the summons the defendant appeared and filed a motion for a continuance for thirty days, supported by an affidavit, as follows:

"STATE OF NEBRASKA, }
LOUP COUNTY. }

"I, John M. Skinner, of lawful age, being first duly sworn, depose and say, that Charles Walker is a material witness for him in the above cause, without whose testimony, which he expects to procure, he cannot safely proceed to trial; that the said Charles Walker, as affiant has just been informed, is at present a resident of the city of Lincoln, Nebraska, and the time required to reach him by mail is

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about five days; that affiant expects to procure the deposition of said Charles Walker within thirty days from this time. This application for an adjournment is not made for delay, but to obtain justice. J. M. SKINNER."

The plaintiff thereupon filed a motion to require the defendant, by his own oath or otherwise, to prove the materiality of the testimony of the absent witness. The motion was sustained, and as the defendant failed to prove the materiality of such evidence, the motion for a continuance was overruled, and, the defendant not appearing further in the case, judgment was rendered by default. The case was taken on error to the district court, where the judgment of the justice was reversed and the cause set down for trial. From this judgment of the district court the cause is brought into this court by petition in error.

Sec. 960 of the Code provides that: "The trial may be adjourned upon the application of either party, without the consent of the other, for a period not exceeding thirty days, as follows: The party asking the adjournment must, if required by his adversary, prove by his own oath, or otherwise, that he cannot, for want of material testimony which he expects to procure, safely proceed to trial."

This action, although brought in the county court, came within the jurisdiction of a justice of the peace and is governed by the provisions of the Code relating to justices. Under the provisions of section 960, where either party desires a continuance for a period not exceeding thirty days, he may obtain the same by complying with the terms of the statute, viz., "prove by his own oath, or otherwise, that he cannot, for want of material testimony which he expects to procure, safely proceed to trial." He need not state the nature of the testimony which he expects to procure. All that the law requires is that he shall believe it to be material in the prosecution or defense of the case. The statute seems to regard thirty days as not an unreasonable time to prepare for trial, and therefore each party

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shall have not to exceed that time to prepare for that event. If, however, a further adjournment exceeding thirty days is desired, the party asking the adjournment for want of material evidence must describe it and show that the delay has not been made necessary by any act or negligence on his part since the action was commenced, and that he expects to procure the evidence at the time stated by him, thus clearly showing that such statements were not required in the first instance.

The judgment of the district court is right and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

28	94
42	345
28	94
42	29

FREMONT, E. & M. V. R. CO. V. MAHLON MEEKER.

[FILED NOVEMBER 26, 1889.]

1. **Eminent Domain : DAMAGES : ELEMENTS TO BE CONSIDERED.**

In assessing damages for right of way for a railway, it is proper to consider the manner in which the road cuts the land, the excavations and embankments, and the exposure of the property to particular injuries from the proximity of the road, which may result from its proper construction and operation. (*M. P. R. R. Co. v. Hayes*, 15 Neb., 224.)

2. ———: ———: ———. The land owner is entitled to full compensation for the land actually taken, and for such damages to the residue of the land as are equivalent to the diminution in value thereof, general benefits not considered.

3. ———: **APPRAISEMENT : APPEAL : PLEADING.** In an appeal to the district court from the award of damages by commissioners, where the only question is the amount of the recovery, new pleadings need not be filed in the district court.

4. **Instructions.** Where instructions are given at the request of a party, he cannot predicate error thereon; nor can error be assigned where no exceptions were taken to the instructions given.

5. **Damages: QUESTION OF FACT.** Questions relating to damages for right of way are peculiarly of a local nature, and where the jury have been permitted to view the premises affected, and rendered a verdict, the verdict will not be set aside unless it is clearly wrong.

ERROR to the district court for York county. Tried below before NORVAL, J.

John B. Hawley, for plaintiff in error:

Before the company can be held liable under the condemnation act (sec. 97, ch. 16, Comp. Stats.), it must have appropriated some portion of the land to be affected. (*B. & M. R. Co. v. Reinhackle*, 15 Neb., 279; *R. V. R. Co. v. Fellers*, 16 Id., 169; *C., K. & N. R. Co. v. Wiebe*, 25 Id., 542.) If defendant in error has been damaged by reason of the conditions complained of, he must resort to an independent proceeding where the questions can be properly tried. The track occupies no portion of claimant's land, and the company cannot be compelled to take what it does not want and will not use.

Merton Meeker, contra:

The embankment and the trench were proper elements to consider in assessing damages. (*Eiseley v. Malchow*, 9 Neb., 180, 181; *F., E. & M. V. R. Co. v. Whalen*, 11 Id., 585; *S. C. & P. R. Co. v. Weimer*, 16 Id., 274; *City of Omaha v. Kramer*, 25 Id., 489; *C., K. & N. R. Co. v. Wiebe*, Id., 542; *Parker v. Boston & M. R. Co.*, 3 Cush. [Mass.], 116, 117; *Little Rock J. R. Co. v. Woodruff*, 49 Ark., 381 [4 Am. State Rep., 55, 56]. The railroad company has acquiesced in the finding of the commissioners, and is bound thereby. (*Mills, Eminent Domain* [2d Ed.], sec. 242; *Goodrich v. Omaha*, 11 Neb., 206; *Downie v. Ladd*, 22 Id., 534; *Wichita R. Co. v. Martin*, 29 Kan., 751-4; *Fitchburg R. Co. v. Boston & M. R. Co.*, 3 Cush. [Mass.], 58; *Flagg v. Worcester*, 8 Id. [Mass.], 71; *Lawrence R.*

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Co. v. Williams, 35 O. St., 169.) Its acts in this case constitute appropriation, though its road-bed may not cross the land. (Mills, Eminent Domain [2d Ed.], sec. 30; *Sulliff v. Johnson*, 17 Neb., 579; *Brigham v. Edwards*, 7 Gray [Mass.], 363; *Vanderlip v. Grand Rapids*, 41 N. W. Rep. [Mich.], 681-2; *McKinzie v. Boone Co.*, 29 Minn., 288; *Pumpelly v. Green Bay Co.*, 13 Wall. [U. S.], 168.) Taking the highway is an appropriation of the adjacent owner's land. (Mills, Eminent Domain, sec. 51; *Kucheman v. Hinke*, 46 Ia., 368; *Trustees v. R. Co.*, 3 Hill [N. Y.], 567; *Lawrence R. Co. v. Williams*, 35 O. St., 169. See also, *R. V. R. Co. v. Fellers*, 16 Neb., 169; *B. & M. R. Co. v. Reinhackle*, 15 Id., 279; *H. & G. I. R. Co. v. Ingalls*, Id., 127.)

MAXWELL, J.

The defendant in error in 1887 was and now is possessed of about three acres of land in the outskirts of the city of York. In the year named the plaintiff in error located its line of road north of said tract, so that a small corner thereof was taken, being but $\frac{4}{100}$ of an acre. The plaintiff in error, through its attorney, George W. Post, seems to have made an effort to effect a settlement with the defendant, but was unable to do so and seems to have made no effort to condemn the land. In February, 1888, the defendant in error filed a petition in the county court of York county for the appraisalment of the damages sustained by him. Notice was duly given the plaintiff in error and commissioners selected and sworn, who made an award of \$100 in favor of the defendant in error. From this award he appealed to the district court, where, on the trial, a verdict was returned in his favor for \$1,200, and, a motion for a new trial having been overruled, judgment was entered on the verdict.

The appellant filed a petition in the district court, setting

forth the same facts as in the petition for condemnation in the county court; and the railway company answered, substantially denying the facts stated in the petition. All this was unnecessary. Where the only question in such case is the amount of the recovery, no new pleadings need be filed in the district court; but no prejudice resulted to either party from the practice resorted to.

The testimony tends to show that the railway in question is located directly north of the land of the defendant in error; that there is a cut at that point of eight to nine feet in depth and the earth is thrown out on each side of said cut and covers the land condemned. It also appears that west of the defendant in error's land there is a high embankment in the public road, made necessary by a high bridge constructed over the railway at a point immediately northwest of the defendant's land.

There is a plat of the various additions to the city before us, with the right of way and location of the bridge marked thereon. We also find in the record the following admission: "Subject to all objections as to relevancy and competency, the defendant (railway company) admits that the defendant (railroad company) took the land immediately east of the plaintiff's land, and the land immediately west of the plaintiff's land to the width of seventy-five feet on each side of the center of the defendant's track for a distance of 300 feet east and 300 feet west of each side of the plaintiff's property."

The testimony tends to show that a portion of the defendant in error's land was taken and appropriated and that he has sustained a considerable amount of damage. The jury were permitted to view the premises, and hence were possessed of means of arriving at the amount of damages from actual observation, which evidence we do not possess.

The court, at the request of the railway company, instructed the jury as follows:

"First—This case has been brought here by an appeal

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from an award of damages by commissioners under the statute, for land of plaintiff, which plaintiff claims the defendant has taken for its right of way in the construction of its road and for the alleged injury to that part of plaintiff's land not taken. The defendant denies that it has taken for right of way any portion of plaintiff's land, or that, by the construction and operation of its road, any portion of plaintiff's land has been injured.

"Second—The jury are instructed that unless the evidence shows that a part of the land of plaintiff was necessary for the construction and operation of the road, they must find for defendant.

"Third—The jury are instructed that the plaintiff is not entitled to any damages whatever by reason of his being cut off from other parts of the town, and in considering the damages you will not take into consideration any evidence that may tend to show damages by reason of the plaintiff being cut off from other parts of the town by reason of the defendant's railroad.

"Fourth—The jury are instructed that it is incumbent upon the plaintiff to prove either that a part of his land was taken by the defendant's railroad, or that it is necessary for the location, construction, and operation of the defendant's railroad; and if they find from the evidence that plaintiff has failed to prove such fact, they must find for the defendant.

"Fifth—The jury are instructed that an incidental injury to property, resulting from the lawful exercise of an independent right, is never held to be a taking of the property where the enjoyment of the right of and privilege does not involve an actual interference or disturbance on any of the property right; and if the jury find that the plaintiff in this case has not in any way been disturbed in his property rights, and is left free to cultivate and improve his land and premises, they must find for the defendant.

"Sixth—If you find from the evidence that it was neces-

sary for the defendant, in the proper construction of its road, to deposit, upon the plaintiff's land, the dirt taken from the cut made for its road-bed, and that the defendant did deposit said dirt upon plaintiff's land, not occupied by the public road, this would be evidence of a taking on the part of the defendant; if it was not necessary in the proper construction of its road to so deposit its dirt, then the deposit of said dirt would not be evidence of taking of plaintiff's land."

The court also, on its own motion, gave a number of instructions, to which no objection was made. The questions of fact were thus submitted to the jury.

In *M. P. R. R. Co. v. Hayes*, 15 Neb., 224, it was held that, "In making such assessment, it is proper to consider the way in which the road cuts the land, the inconvenient shape in which the residue is left, the excavations and embankments, and the exposure of the owner's property to particular injuries from its proximity to the road, which may result from its proper construction and operation;" and in *Chicago, K. & N. Ry. v. Wiebe*, 25 Neb., 542, that "In an appeal from the award of damages sustained by a land owner from the location of a railway across his land, he is entitled to full compensation for the land actually taken, and for such damages to the residue of the land as are equivalent to the diminution in value thereof, general benefits not to be considered."

The cases above cited state the law correctly, as we believe, and they will be adhered to. There is considerable stress laid upon certain evidence in regard to the embankment and bridge near the house of the defendant in error, but no particular instruction was asked or given in regard to that nor apparently any foundation upon which to predicate error. The third instruction, given at the request of the railway company, apparently was intended to apply to the obstruction in the public road caused by the excavation in question. The bridge is not mentioned. Whether

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the case of *Chicago, K. & N. Ry. Co. v. Wiebe*, 25 Neb., 542, is applicable to the facts of this case, the obstruction in street being connected with the property taken, we need not determine. That the land owner has sustained a very considerable amount of damages by reason of the location and grading of the railway of the plaintiff in error is clearly shown, and as the questions were submitted to the jury, we cannot interfere with the verdict. Some of the instructions given at the request of the railway company are probably too favorable to the company to be an accurate statement of the law, but that question is not before the court.

In a number of cases this court has held that questions of damage for right of way were peculiarly of a local nature, proper for the consideration of a jury of the county where the land is situated. (*Omaha Belt Ry. Co. v. Johnson*, 24 Neb., 707; *Clarke v. C., K. & N. R. R. Co.*, 23 Id., 616.) There is no material error apparent in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JOHN A. SMILEY V. WILLIAM ANDERSON.

[FILED NOVEMBER 26, 1889.]

28	100
57	303
28	100
61	855

1. **Assumpsit: PLEADING: QUESTION OF FACT.** In an action to recover the value of certain services the defendant in his answer alleged that "the plaintiff never performed the services claimed at defendant's request and defendant never promised to pay for any such services," *held*, an admission that the services were rendered as claimed, but the question whether they were voluntary or rendered at the defendant's request must be determined by the jury from the evidence.
2. **Instructions examined, and *held*, applicable to the evidence.**

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

Savage, Morris & Davis, for plaintiff in error.

No brief filed.

Lee S. Estelle, contra, cited: *Hohman v. Steele*, 18 Neb., 652; *Churchill v. Holton*, 38 Minn., 519; *Ludlow v. Dole*, 62 N. Y., 617.

MAXWELL, J.

This action is brought by the defendant in error against the plaintiff in error to recover the value of certain services which it is alleged he rendered at the plaintiff in error's request. It is alleged in the petition that "The plaintiff entered into the service of the defendant, at his request, as agent, to negotiate with the Belt Line Railway Company, now known as the Missouri Pacific Railway Company, for the purpose of bringing about a settlement between the said John A. Smiley and the railway company, the said defendant John A. Smiley then claiming damages from the said railway company for lands taken from the said John A. Smiley for the right of way for the track of said railway company; that said plaintiff continued in the service of said defendant until March 20, 1887; that during said time plaintiff performed services as agent for said defendant, and that the difference between the said John A. Smiley and the said railway company was finally compromised, the said railway company paying the said Smiley the sum of \$8,500; that said defendant agreed to pay to said plaintiff for said services such sum as they were reasonably worth, and in addition thereto five per cent of all sums recovered from or paid by said railroad company to said John A. Smiley; that said services were

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reasonably worth \$100 per month; that five per cent of the sum recovered by Smiley from said railroad company is \$425; that there is now due from said defendant to said plaintiff the sum of \$1,425, with interest from March 20, 1887."

To this petition Smiley filed an answer, in which he alleges that "The plaintiff never performed the services claimed at defendant's request, and defendant never promised to pay for any such services."

On the trial of the cause the jury returned a verdict for \$200, in favor of Anderson, upon which judgment was rendered.

It will be observed that the rendering of the services as claimed is admitted, and the only question for determination is, Were such services rendered at Smiley's request? Upon that point the proof is abundant, and fully sustains the verdict.

The court instructed the jury that "If a person requests another to perform services for him, and there be no agreement as to whether they shall be paid for or not, then, unless it appears from the circumstances that there is a mutual understanding between the parties, that the services shall be rendered gratuitously, the law implies that there shall be a reasonable compensation paid therefor." But if it appears that there was such understanding, and the services are rendered pursuant thereto, the person rendering them is entitled to recover compensation therefor. This was fully warranted by the evidence and there was no error in giving it. The seventh instruction is objected to. It is as follows: "In determining what is a reasonable compensation for the services, if you have occasion to do so, you may consider all the facts in regard to them, and what the parties may have said to each other as to compensation, although no witness has given an opinion as to the value thereof." There is testimony in the record tending to show that Smiley had promised to pay Ander-

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son the same wages that he had been receiving as an employe of the Union Pacific Railway, if he would assist him in effecting a settlement of the claim in controversy, and the instruction in question no doubt was given with reference to such testimony, and seems to be unobjectionable. It is apparent that there is no material error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

STATE, EX REL. WILLIAM H. HUNT, V. MAYOR AND
CITY COUNCIL OF KEARNEY.

[FILED DECEMBER 3, 1889.]

1. **Elections: CONTEST: APPEAL: BOND DOES NOT SUSPEND JUDGMENT.** Where, in a contest of election, the district court declares the party contesting entitled to the office of councilman of a city, a supersedeas bond, although duly filed and approved, will not stay the judgment, there being no provision of statute for such suspension of judgment. (*State v. Meeker*, 19 Neb., 444; *Gandy v. State*, 10 Id., 249.)
2. ———: ———: **INJUNCTION.** Where, in a contest of election, the contestant has been adjudged entitled to the office contested, a court of equity has no authority to enjoin him from taking possession of the office, and an appeal from an order dissolving the temporary injunction will not lie.

ORIGINAL application for *mandamus*.

Marston & Nevius, for relator.

E. C. Calkins, and *Hartman & Dryden*, *contra*.

MAXWELL, J.

This is an application for a *mandamus* to compel the defendants to admit the relator to his seat as a member of the council of said city. It is alleged in the petition that "the city of Kearney, Nebraska, is a municipal corporation, organized as a city of the second class of over 5,000 inhabitants, under the general laws of the state of Nebraska, and is divided into four wards, and has been so organized and divided for nearly two years last past; that the plaintiff is a resident, legal voter, and taxpayer of the Fourth ward in said city, duly qualified to hold office therein, and has been ever since its organization and division as aforesaid; that at the annual election for councilmen, held in said city on the 3d day of April, 1888, there were two councilmen to be elected in said Fourth ward: one for one year, called the short term, and one for two years, called the long term, and that the plaintiff was elected as councilman from said Fourth ward for the said long term of two years; that at said election one John Barnd was also a candidate for the office of councilman of said Fourth ward for said long term, and claimed to be elected to said office; that on or about the 9th day of April, 1888, the plaintiff contested the election of said John Barnd to said office in the county court of said Buffalo county, and upon the hearing of the said contest the same was decided, by said court, in favor of this plaintiff; that thereupon said John Barnd appealed said cause to the district court of said county, and upon the hearing thereof in said court, on the 18th day of February, 1889, a judgment was entered therein by said court, containing, among other things, the words and figures following, to-wit: 'It is therefore ordered and adjudged by the court that the said William H. Hunt be, and he is hereby, declared the duly elected councilman for the long term in the Fourth ward in the said city of Kearney, Ne-

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braska, and entitled to the possession of said office, and entitled to all the honors and emoluments thereof, from and after the 1st day of May, 1888, and to the end of said term'; that no appeal has ever been taken from said judgment, to this or any other court; that on the 20th day of September, 1889, an order of the judge of said district court was issued directed to the sheriff of said Buffalo county and commanding him to put the plaintiff in possession of his said office of councilman, which order was duly executed by said sheriff on the night of the 21st day of September, 1889, and the plaintiff was put in possession of his seat and office, but the said mayor and council have ever since refused to allow this plaintiff to take his seat, or to take any part in the proceedings of said council, and still refuse; that on the 21st day of October, 1889, the plaintiff made upon the defendants a demand in writing for his seat in said council as a member thereof on the ground (1) that he was lawfully entitled to the possession of said office by virtue of a judgment and order of the district court in and for Buffalo county, Nebraska, from which judgment no appeal had ever been taken; (2) that they, nor any others, had the lawful right to prevent him from taking possession of and performing the duties of the office of councilman of said city, but his demand was refused, and the mayor and council still refuse to admit or recognize him as a member of said council; that he is lawfully and legally entitled to the possession of said office, and to a seat in said council, and to participate in the proceedings thereof, by virtue of his election thereto, as well as by the judgment of the district court of said Buffalo county, as herein set forth; that the said term of two years, for which said plaintiff was elected councilman as aforesaid, will expire on or about the first Tuesday in April, 1890, that being the time fixed by law for holding the annual election for councilmen in said city, and that unless granted the relief herein asked his said term of office will expire and he be deprived of his rights

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to hold said office, and exercise the rights and privileges and enjoy the honors thereof, as he is lawfully entitled to do."

To this petition the defendants filed an answer, as follows: "They admit the first, second, fourth, and all of the fifth paragraphs of said petition, except that part of the fifth that pertains to the matter of appeal from the judgment of the district court, set out in said petition, and also admit the seventh paragraph in said petition, and denies each and every other allegation in said petition contained not hereinafter or hereinbefore admitted or denied.

"They allege that it is true that the said Hunt was a candidate for election against the said Barnd, as in said petition set out, but deny that said Hunt was elected as a member of said council, and state the truth to be that a certificate of election was issued to the said Barnd, as councilman from the Fourth ward, and that after said election the said Hunt filed a complaint contesting said election in the county court of said Buffalo county, and that on hearing said contest, said judge decided the same to be a tie, whereupon lots were cast and the said Hunt secured the favorable choice; and thereupon the said Barnd appealed said cause to the district court, in which court, on trial of said case, said contest was again declared to be a tie, whereupon lots were cast, resulting in a choice in favor of said Hunt, and that thereupon the Honorable Lewis A. Groff, judge trying said cause, entered a decree in words and figures following:

* * * * *

"Now, on this day, this cause coming on to be heard, upon the pleadings and the stipulation of the parties filed herein, the court proceeded to inspect the twenty-one ballots submitted under said stipulation, and upon the examination of said ballots, and after hearing arguments of counsel, and being fully advised in the premises, doth find that the said twenty-one ballots, numbered from one to twenty-one,

inclusive, for identification and convenient reference, numbers 2, 3, 6, 7, 9, 10, 11, 12, 15, and 21 were cast for the said John Barnd, contestee, and being added to the 117 votes admitted in said stipulation, makes the whole number of votes cast for him at said election aforesaid 127; and numbers 1, 4, 5, 8, 13, 19, and 20 were cast for William H. Hunt, contestant, which being added to the 121 votes admitted in said stipulation, makes the whole number of votes cast for him at said election aforesaid 127; that numbers 14, 16, 17, and 18 of said votes be rejected as void. It appearing from the said count that each of said candidates received an equal number of votes cast at said election, and that the result was a tie vote, it is ordered by the court that the said parties proceed to determine the question which of them shall be declared elected to said office by lot, as provided for by statute; that the said lot be prepared and cast as follows: That two envelopes, exactly alike, be prepared, in each of which shall be placed a piece of paper, one of said slips having written thereon the word "Councilman," and both of said envelopes duly sealed and placed in a hat by the court, and that the sheriff of this court be blindfolded, and in the presence of the court and the parties, or their counsel, draw from said hat one of said envelopes, at the same time calling the name of the candidate for whom he draws, and if the envelope so drawn contains the slip with the word "Councilman" thereon, then the person so named by the said sheriff shall be declared as having been duly elected to said office; and if the envelope so drawn shall contain the blank slip of paper, then the candidate not named by the sheriff, as aforesaid, shall be declared as having been duly elected to said office, and that said drawing take place immediately. And now the said drawing having taken place, and the said sheriff having drawn from said hat one of said envelopes, and at the same time saying that he drew for John Barnd, and upon opening the said envelope by the court it is found

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that the said envelope contained the blank slip of paper, it is therefore ordered and adjudged by the court that the said William H. Hunt be, and he is hereby, declared the duly elected councilman for the long term in the Fourth ward, and in the said city of Kearney, Nebraska, and entitled to the possession of said office and all the honors and emoluments thereof, from and after the first day of May, 1888, and to the end of said term.'

"That within twenty days after said decree was rendered the said Barnd filed his bond in the sum of \$500, with good and approved sureties, and on or about the 1st day of September, 1889, had prepared by the clerk of said district court a transcript of the proceedings in said cause, and thereafter, to-wit, on the 23d day of September, 1889, filed the aforesaid transcript, together with a petition in error in the supreme court of Nebraska, and on said last named date caused the clerk of said supreme court to issue a summons in error for the said Hunt, and that the same was served on the said Hunt by the sheriff of said Buffalo county on the 25th day of September, 1889, and the defendants aver that said cause is at this time pending and undetermined in said supreme court."

There is also an allegation that a judge of the district court, sitting at chambers at North Platte, did issue a writ of ouster to the sheriff of Buffalo county, commanding him to eject Barnd from said office, and that such writ was duly executed; that immediately thereafter, to-wit, on the 30th day of September, 1889, Barnd commenced an action in the district court of Buffalo county to enjoin Hunt from taking his seat in said city council; that a temporary injunction was thereupon granted, which was afterwards dissolved; to which dissolution an exception was duly taken and a bond in the sum of \$1,000, with good and sufficient sureties, was thereupon duly filed and approved, as required by chapters 26 and 27 of the Session Laws of 1889, which, it is claimed, stay all proceedings while the appeal

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from the order dissolving the injunction is pending. The relator demurred to the answer, and the case is submitted on the pleadings.

The fourth subdivison of chapter 26 is as follows: "When the judgment, decree, or final order dissolves or modifies any order of injunction which has been, or hereafter may be, granted, the supersedeas bond shall be in such reasonable sum as the court or judge thereof, in vacation, shall prescribe, conditioned that the appellant or appellants will prosecute such appeal without delay, and will pay all costs which may be found against him, or them, on the final determination of the cause in the supreme court; and such supersedeas bond shall stay the doing of the act or acts sought to be restrained by the suit, and continue such injunction in force until the case is heard and finally determined in the supreme court. The undertaking given upon the allowance of the injunction shall be and remain in effect until it is finally decided whether or not the injunction ought to have been granted."

Chapter 27 provides: "That in case of the dissolution or modification by any court, or any judge at chambers, of any temporary order of injunction which has been, or may hereafter be, granted, the court or judge so dissolving or modifying said order of injunction shall at the same time fix a reasonable sum as the amount of a supersedeas bond, which the person or persons applying for said injunction may give, and prevent the doing of the act or acts, the commission of which was, or may be, sought to be restrained by the injunction so dissolved or modified. Such supersedeas bond shall be executed on or before twenty days from the time of the order dissolving or modifying such injunction, shall be signed by one or more sufficient sureties, to be approved by the clerk of the court, and shall be conditioned that the party or parties who obtained such injunction shall pay to the defendant, or defendants, all damages which he or they shall sustain by reason of said

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injunction, if it be finally decided that such injunction ought not to have been granted. Such supersedeas bond shall stay the doing of the act or acts sought to be restrained by the suit, and continue such injunction in force until the case is heard and finally determined by the judgment, decree, or final order of the court in term time."

In cases of removal from office a supersedeas bond does not stay the proceedings (*State v. Meeker*, 19 Neb., 444), as there is no provision of statute authorizing a suspension of the judgment in such cases. This question was very fully considered by the court in *State v. Meeker*, *supra*, and the decision, we believe, is correct. It will therefore be adhered to.

The only question for determination, therefore, is whether or not a court of equity, or the judge thereof, had authority to grant an injunction in a case like that under consideration.

Under a republican form of government the will of the people as shown by the necessary majority in the selection of the various elective officers must be permitted to govern. It is indispensable to the permanency of such form of government that the courts shall not prevent the party holding the apparent right to a particular office from filling the same and performing the duties thereof until such time as, by contest or *quo warranto*, a court of law having jurisdiction of the subject-matter and the parties shall render a judgment either confirming the incumbent in the office or ousting him therefrom. If an injunction may be granted to restrain a person declared to be entitled to the office of councilman in one of the cities of the state, then it may be granted to restrain the governor of the state, duly elected, from being inducted into office or performing the duties thereof, and on various pretexts this might be continued until his term expired, and if the power is once admitted, it may be sought against every elective officer in the state, and thus the machinery of the courts, which is de-

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signed to protect and enforce rights, will become the means by which a party not entitled to an office could retain possession of the same and keep the one elected thereto out of possession. The law provides an adequate penalty in case one not an elector casts a ballot at any election, or for importing voters into a county other than that in which they reside, to vote therein, or for voting more than once at any election, or for placing fraudulent votes in the ballot box. These punishments are inflicted upon those thus violating the law, because by these unauthorized votes they may defeat the will of the lawful electors and thus foist upon the people an officer who was not their choice for that office. In other words, these acts tend to defeat the will of the majority, and may entirely do so. If an individual may not do an act like those above named, which would tend to subvert the popular will, how much more important that the courts shall not defeat it, by preventing the person holding the proper credentials from discharging the duties of his office. If in the case of the individual it is a crime, morally it is a still greater offense for the courts to prevent by injunction the officer having the certificate showing his election to the office, from filling the same; and a court of equity has no jurisdiction in such cases. (*Delahanty v. Warner*, 75 Ill., 185; *Sheridan v. Colvin*, 78 Id., 246; *Dickey v. Reed*, Id., 261; *People v. Draper*, 24 Barb. [N. Y.], 265.) The statute has provided an adequate remedy, either by contest or *quo warranto*, for the settlement of the rights of parties in election cases, and those remedies are exclusive. The acts in question do not apply to a case like that under consideration, and the proceedings relating to the injunction are void. It follows that the writ of *mandamus* will issue as prayed.

WRIT ALLOWED.

THE other judges concur.

28 112
47 776MISSOURI PACIFIC RAILWAY COMPANY V. M. H.
VANDEVENTER.

[FILED DECEMBER 4, 1889.]

1. **Railroads: KILLING STOCK: NEGLIGENCE: QUESTION OF FACT.** In an action for damages resulting from the killing of horses belonging to the plaintiff in such action, and which had strayed upon a railroad track through an open gate in the fence erected along the sides thereof by the railroad company, the evidence showed that the train which killed said horses struck them in the night; that there was snow on the ground which had lain there some time, and was packed and solid; that a light snow had fallen on the night of the accident, but previous thereto. The train was running at a high rate of speed. From the tracks made in the recently fallen snow it was apparent that the horses had run at a rapid rate of speed in front of the engine for some distance, but were finally caught, thrown from the track, and killed. This was held to be sufficient proof of negligence on the part of the railroad company to justify the submission of the question to the jury and to sustain a verdict in favor of the plaintiff in the action.
2. ———: ———: ———: **INSTRUCTIONS.** In such case the question of negligence was one proper to be submitted to the jury by the instructions.

ERROR to the district court for Richardson county.
Tried below before APPELGET, J.

B. P. Waggoner, and *Isham Reavis*, for plaintiff in error, cited: *C., B. & Q. R. Co. v. Magee*, 60 Ill., 529; *Indianapolis & C. R. Co. v. Adkins*, 23 Ind., 340, 345; *Indianapolis, P. & C. R. Co. v. Shimer*, 17 Ind., 295; *Russell v. Hanley*, 20 Ia., 219; *Vanhorn v. Burlington, C. R. & N. R. Co.*, 63 Ia., 67; *Eames v. Boston & W. R. Co.*, 14 Allen, [Mass.], 151; *Maynard v. Boston & M. R. Co.*, 115 Mass., 458; *Brooks v. N. Y. & E. R. Co.*, 13 Barb. [N. Y.], 594.

Frank Martin, for defendant in error, cited: *C. & A. R.*

Co., 92 Ill., 247; *Baker v. C., B. & Q. R. Co.*, 73 Ia., 389 [35 N. W. Rep., 460].

REESE, CH. J.

This is a proceeding in error to the district court of Richardson county.

Defendant in error filed his petition in that court, in which he alleged in substance that plaintiff in error was a corporation owning, operating, and managing a line of railroad through Richardson county, in this state, and that on the 4th day of February, 1886, while so operating said road, and at a point thereon between the village of Verdon and the village of Stella, and at a point on said road where it was the duty of plaintiff in error to keep its track fenced, plaintiff in error had constructed a gate for a private crossing over and upon said track, but had carelessly and negligently allowed said gate to remain unfastened, unsecured, and open, so as to allow free ingress and egress to and from said track, and that during the night preceding the date named, three horses, the property of defendant in error, without his knowledge, fault, or negligence, broke out of his enclosure, escaped from his premises, and passed through the said open gate onto the track of plaintiff in error, where it, by its agent, servants, and employes, ran an engine and train of cars over and upon the horses, by which they were killed; to the damage of defendant in error in the sum of \$335, the alleged value of said property. It was also alleged that said horses were upon the track of plaintiff in error and in plain view of its agents and employes engaged in running said train, which was moving at a very rapid rate of speed, and that they negligently, willfully, and intentionally ran onto and upon said horses; that due notice of said loss had been given to plaintiff in error by defendant prior to instituting the suit.

The amended answer of plaintiff in error admitted the

corporate capacity of said company and that at the time referred to it was operating the line of railroad as stated in the petition. But it was alleged that the track was securely fenced, as required by law, at the point where the horses came upon said track and where the collision occurred, but that said track at that point, being across the farm of one Andrew Tynan, plaintiff in error, had erected for the sole use and benefit of said Tynan a gate or crossing to enable him to pass from one part of his farm to another, over and across the said track; that said gate had been opened by some person to plaintiff in error unknown and without fault or negligence on its part; that said gate was constructed for the sole use and benefit of the said Tynan, and in no particular whatever for the use or benefit of plaintiff in error. All negligence on the part of plaintiff in error was denied.

A trial was had to a jury, which resulted in a verdict and judgment in favor of defendant in error, and against plaintiff in error, for the sum of \$325.

The facts, as shown by the evidence submitted to the jury, may be briefly stated to be: That on the night in question defendant in error had the horses referred to in lots on his farm, which was near to and adjoining the farm of Tynan; that during the night they escaped through an open gate onto the said Tynan's farm, and finally wandered through the open gate at the crossing onto the railroad track of plaintiff in error. The witnesses on the part of defendant in error testified that on the next morning the horses were found near the railroad track, two of them dead, the other badly injured; that at that time there was a large quantity of snow upon the ground, which had lain there for a considerable length of time, and was packed and solid; that during the night previous to the morning referred to a light snow had fallen, and by the tracks of the horses in this snow it was seen that they had passed through the gate onto the track of plaintiff in error and had moved southeasterly along said track for a considerable distance,

perhaps about one quarter of a mile ; that it appeared from the tracks that they had stopped, turned suddenly around, and taken the opposite direction in a run, the tracks showing where they had slipped in starting, as though making a sudden turn. By the distance between their tracks, it was concluded they had run in a northeasterly direction between the rails for a distance of about seven hundred feet from where they turned and about six hundred and fifty feet from where they had reached a full run. At this point two of the horses were found dead near the track, the third in the condition hereinbefore stated, standing near by. It was also shown by the snow upon the ground, and by the condition of the horses, that they had been thrown violently from the track upon either side of the road-bed. It was also testified on the part of defendant in error that no snow had fallen into the tracks made at the time and prior to the collision, and that therefore the accident occurred after the snow had ceased falling. That at the point where the accident occurred the road was substantially level and straight, and at the place where the horses turned their course from the southeast to the northwest along the track, the engine could have been seen approaching about forty rods distant.

From these facts it was urged upon the trial in the district court, and contended in this court, that had the servants of plaintiff in error, who had charge of the train, been properly attending to their duties, and keeping a lookout upon the track ahead, they could have not only seen the horses when they turned to retrace their steps, but that by the rapidity with which the horses ran, as was shown by their tracks, the whole distance of the seven hundred feet, over which the engine passed while pursuing them, they were in plain view of the engineer and fireman, and that the accident resulted either through the gross negligence of the said engineer and fireman in not seeing the horses, and checking the speed of the train, or in willfully and intentionally running them down by the engine. It was shown

that subsequent to the accident and prior to the trial the engineer had died. The fireman was called as a witness on the part of plaintiff in error and he testified that at the time of the accident it was snowing very hard and that sleet was falling; that he could not see the horses until directly upon them, when it was impossible to stop the train or to so check its speed so as to prevent the accident; that the horses at that time were not running but were standing upon the track, two of them with their heads towards the train, and were so standing when they were struck by the engine; that the third one, at the moment of the collision, with the two referred to, turned and ran some distance along the track, when he too was caught by the train and thrown off.

Witnesses on the part of defendant in error testified that there was no sleet on the night referred to; that it was very cold and the snow as it lay upon the ground the next morning was very light.

The assignments of error contained in plaintiff's petition are: That the verdict was contrary to, and not supported by, evidence, and was contrary to law and the instructions of the court, and that the evidence did not warrant the verdict in favor of defendant in error; that the court erred in modifying and changing an instruction to the jury requested by plaintiff in error and in overruling the motion for a new trial.

It was not shown by the evidence how long the gate at the crossing referred to had been permitted to stand open, nor whether plaintiff in error knew, or might have known, of its condition, prior to the occurrence of the accident. It is contended that plaintiff in error owed no obligation to defendant in error in connection with said gate, it being the private property and for the sole use and benefit of Mr. Tynan, the owner of the farm through which the road passed; that the track being fenced, it was not negligence on the part of plaintiff in error to run its train at a high rate of speed, and therefore, in the absence of negligence

with reference to the gate referred to, on the part of plaintiff, it could not be held liable unless it was shown that the horses were willfully, wantonly, and intentionally killed by the servants of plaintiff in error in the operation of the train; that the evidence does not establish either of these propositions, and therefore the verdict should have been in favor of plaintiff in error.

Upon the other hand it is contended by defendant in error that the evidence fully and sufficiently shows that the horses must have been killed, not only by the negligence of the employes of plaintiff in error, but that such killing must have been willful and wanton, else it would have been avoided.

Upon the question as to whether the night of the accident was so dark and stormy at the time of the collision as to render the engineer and fireman unable to see the horses at any distance, the evidence was conflicting, and for the purpose of this decision we must presume the jury found correctly—that they could have been discovered had a sufficient lookout been maintained. We think it must also be conceded that the horses ran in front of the train from the point where they turned upon the track to where they were thrown off by the pilot. This is not only reasonable from the evidence, but no other conclusion can be adopted consistent with the physical appearances on the next morning as detailed by the witnesses. At all events we cannot say that a man in the exercise of fair judgment and without passion or prejudice might not find that the men in charge of the engine could have avoided the injury by the exercise of ordinary care. If the facts existed as contended, and of this the jury were the sole judges, plaintiff in error was negligent and liable. (*C. & A. R. Co v. Kellam*, 92 Ill., 247; *Baker v. Railroad Company*, 35 N. W. Rep. [Iowa], 460.)

It is contended that the trial court erred in modifying an instruction asked by plaintiff in error and in giving the instruction as modified. The instruction asked was as follows:

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"If the jury find from the evidence that the horses escaped upon the track of the defendant through a gate erected by the company for the accommodation of Mr. Tynan, the court instructs you that the defendant cannot be held responsible for that fact, as it was not charged with any duty with reference to keeping the gate shut and therefore was not to blame for killing the horses unless the jury shall be satisfied that the killing was done willfully and wantonly by the servants of defendant." The modification added was as follows: "Or unless you shall further find that the killing was done through the negligence of the servants of defendant." As will be observed, this modification submitted to the jury the question of negligence, which had been omitted from the instruction as asked.

We apprehend that, even were it true that the horses went upon the track without fault or negligence on the part of plaintiff in error or its employes, yet this would not relieve it from the exercise of care, or justify it in negligently killing the horses, and therefore the question of negligence was properly submitted to the jury.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

28	118
47	148

CHICAGO, B. & Q. R. Co. v. PRESTON RICHARDSON.

[FILED DECEMBER 4, 1889.]

1. **Dismissal: NOT PROPER AFTER COMMENCEMENT OF TRIAL.**

After the introduction of the testimony of the plaintiff to a jury impaneled to try a cause the court has no authority to dismiss a case and discharge the jury without a verdict upon the merits. (*Smith v. S. C. & P. B. Co.*, 15 Neb., 583.)

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2. **Railroads: KILLING STOCK: NEGLIGENCE: EVIDENCE.** In an action against a railroad company for the value of a cow killed within the corporate limits of the city of L., the killing of the cow and her value were admitted upon the trial. The only questions to be submitted to the jury were whether the employes of the railroad company were negligent in killing said cow and whether the plaintiff in the action was guilty of negligence in permitting her to run at large within the city in violation of its ordinances. As bearing upon these questions of negligence, the ordinances of the city limiting the rate of speed at which trains of cars might be run, and the ordinance prohibiting the owners of cattle from allowing such stock to run at large, were proper evidence to be submitted to the jury, but neither was conclusive proof of the fact of negligence, even if violated.

ERROR to the district court for Richardson county.
Tried below before FIELD, J.

Marquett & Deweese, and *A. G. Greenlee*, for plaintiff in error:

The animal was killed at a point where the company was not required to fence. (*Clary v. B. & M. R. Co.*, 14 Neb., 232.) The mere fact of the killing is not evidence of negligence. (3 Wood's Railway Law, 1547.) The train was running not more than four miles an hour, while a speed of eighteen miles through a city is not negligence. (*B. & M. R. Co. v. Wendt*, 12 Neb., 76.) The animal was running at large at a place where the city ordinance forbade it. Its owner was therefore guilty of contributory negligence, and the question thereof should have been submitted to the jury. (*B. & M. R. Co. v. Wendt*, 12 Neb., 79; *Kuhn v. C., R. I. & P. R. Co.*, 42 Ia., 420; *Van Horn v. Burlington, C. R. & N. R. Co.*, 59 Ia., 33.) Independent of the ordinance the place was dangerous, and defendant was guilty of negligence on account of the numerous tracks and the constant passage of trains. (*Smith v. C., R. I. & P. R. Co.*, 34 Ia., 506; *C. H. & D. R. Co. v. Street*, 50 Ind., 225.) The company is liable only for willful killing. (3 Wood's Railway Law, 1555.)

Stevens & Love, contra:

Speed in excess of the rate prescribed by statute or ordinance is negligence *per se*. (*Correll v. R. Co.*, 38 Ia., 120; *Jetter v. N. Y., etc., R. Co.*, 2 Abb. Ct. of App. Dec. [N. Y.], 458; *Karle v. K. C. R. Co.*, 55 Mo., 476; *Bowman v. Chicago & A. R. Co.*, 85 Mo. 533; *Toledo, etc., R. Co. v. Deacon*, 63 Ill., 91; *Houston & T. R. Co. v. Terry*, 42 Tex. 451.) Especially was it such in this case, as the engineer knew the cattle were in the vicinity. (*U. P. R. Co. v. Rasmussen*, 25 Neb., 813.) The mere fact of the stock running at large contrary to the ordinance cannot avail the company as a defense of the negligence of its servants when they were in a position to know of the danger. (*C., M. & St. P. R. Co. v. Phillips*, 14 Ill. App., 265; *Chicago & A. R. Co. v. Hill*, 24 Ill. App., 619; *Northern C. R. Co. v. Ward*, 63 Md., 362; *Palmer v. Northern P. R. Co.*, 37 Minn., 223; *Brooks v. Hannibal, etc., R. Co.*, 27 Mo. App., 573.) Nor does the mere fact of the stock running at large constitute contributory negligence on the owner's part. (*Bulkley v. R. Co.*, 27 Conn., 479; *Pearson v. Milwaukee & St. P. R. Co.*, 45 Ia., 497; *A. T. & S. F. R. Co. v. Davis*, 31 Kan., 645; *M. P. R. Co. v. Johnston*, 35 Id., 58; *Bowman v. Chicago & A. R. Co.*, 85 Mo., 533; *Jones v. Columbia & G. R. Co.*, 20 S. Car., 249.)

REESE, CH. J.

This action was instituted for the purpose of recovering the value of a cow which was alleged to have been killed by an engine attached to a passenger train of plaintiff in error at a point in the city of Lincoln where the plaintiff's track crossed K street. It was alleged in the petition that the train was running at a high rate of speed when it approached the crossing and that the accident occurred through the carelessness and negligence of the employes of plaintiff in error and without fault on the part of defendant in error.

The killing of the cow was admitted in the answer. But it was alleged that the accident occurred within the city of Lincoln at a point where the plaintiff in error had not the right to fence its track; that defendant in error allowed his cow to run at large in said city contrary to the ordinances thereof, and that the cow was injured and killed by the negligence and carelessness of defendant in error and without any fault on the part of plaintiff in error. The reply was a general denial.

A jury trial was had in the district court which resulted in a verdict in favor of defendant in error, fixing his damages at \$46.84, upon which judgment was rendered.

After the evidence on the part of defendant in error had been adduced, plaintiff in error moved "that the case be dismissed on the ground that the evidence is not sufficient to support a verdict for plaintiff." This motion was overruled and the action of the court thereon is now assigned for error.

A question similar to the one here presented was before this court in *Smith v. S. C. & P. R. R. Co.*, 15 Neb., 583, when it was decided that after the introduction of the testimony of the plaintiff in the case, to a jury impaneled to try the cause, the district court had no authority to dismiss the action and discharge the jury without a verdict upon its merits. The court therefore did not err in refusing to dismiss the case.

The next contention of plaintiff in error is that the court erred in refusing to give to the jury the third instruction requested by it on the trial. This instruction was as follows:

"The jury are instructed that to entitle the plaintiff to recover in this case he must prove the negligence on the part of the railroad company. There is no evidence of negligence on the part of said company and your verdict should therefore be for the defendant."

The giving of this instruction would have been equiva-

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lent to a withdrawal of the case from the jury and a direction to return a verdict in favor of plaintiff in error. As will be noticed further on, the evidence, although not as direct and convincing as might have been desired, was sufficient to require its submission to the jury, and sufficient to sustain a finding based thereon.

The killing of the cow and her value having been admitted by plaintiff in error upon the trial, the principal question submitted to the jury was as to whether the agents and employes of plaintiff in error exercised due care and diligence in running its train through the city and as it approached the crossing. Upon this part of the case the evidence was conflicting. It was shown by a witness called on behalf of defendant in error that the train was running at a high rate of speed, the witness being a lady who resided near by and who witnessed the accident. She was unable to testify at what rate of speed the train was running, but stated that it was going about as fast as an ordinary horse would run; that when she saw the train strike the cow she immediately turned away, but in an instant turned again and saw the cow thrown from the pilot. Upon the other hand it was testified by the agents and employes of defendant in error that the train was running at the rate of about four miles per hour, and by one that the train had stopped near by, owing to cattle being upon the track, and that as it was starting up the cow ran upon the track and was caught by the pilot of the engine. This witness was to some extent discredited by proof of his testimony upon the trial of the same case in the inferior court. The whole question of negligence having been submitted to the jury upon this conflicting evidence, we cannot say that their verdict was wrong, there being sufficient evidence to warrant a finding of negligence on the part of the train men in running the train at too great a rate of speed.

Upon the trial both parties introduced the ordinances of the city. That introduced by plaintiff in error being the

ordinance prohibiting the running at large of cattle within the city, and that introduced by defendant in error being one limiting the speed of trains to four miles per hour within the city limits.

While it was perhaps competent for the jury to consider the fact that the cow was unlawfully running at large, as tending to prove contributory negligence on the part of defendant in error, yet that fact could not avail the railroad company as a defense if the injury was the result of the negligence of its servants after they saw, or might have seen, the danger to the animal; or if the train was being run at a reckless or dangerous rate of speed. Both were competent to be considered by the jury, but neither was conclusive evidence of the negligence upon the part of the parties against whom it was introduced. (*U. P. R. R. Co. v. Rasmussen*, 25 Neb., 813.)

It is next contended that the court erred in refusing to give to the jury the second instruction asked by plaintiff in error, and giving in its stead the fourth of the instructions given on its own motion. By the former, plaintiff in error sought to have the jury instructed that if the plaintiff turned the animal—for whose death the action was brought—loose in the vicinity of the railroad track and left her to wander wherever she would, and while so wandering she was killed, that he was guilty of contributory negligence and could not recover. While by the latter the court instructed the jury that running a train at a greater rate of speed than allowed by the ordinance would not in itself be negligence but would be if such speed was the cause of the accident, and that the running at large of the cow would not in itself be contributory negligence but would be a fact for the jury to consider.

In this action of the court we think there was no error. There was no proof as to whether the cow of defendant in error was turned loose by him or whether she had made her escape from his enclosure. But we think this would

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hardly be material, as it could not be claimed that plaintiff in error could have the right to kill her negligently whatever might have been the fact as to the cause of her being permitted to go upon the track.

We find no error in the case calling for a reversal of the judgment of the district court. It will therefore be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

PHOENIX INSURANCE COMPANY V. WILLIAM MEIER.

[FILED DECEMBER 4, 1889.]

1. **Pleading.** A denial of the facts alleged in the pleadings should be direct and specific. A denial of the facts averred in the petition "as alleged in the petition" is not a denial of the allegations.
2. **Insurance: AGENT: AUTHORITY.** When an insurance agent, who has authority to issue policies of insurance, issues and delivers a policy upon a building therein described and agrees with the assured to deduct the premium out of money then in his possession belonging to the assured and apply it on the payment of the premium, such an agreement is a receipt of the premium, and the company issuing the policy will be bound thereby.
3. ——— : **POLICY: DELIVERY: WHAT IS?** In such case, where the policy is delivered to the assured but is returned to the agent to be kept in the safe of such agent, with other papers belonging to the assured, the delivery of the policy will be complete, notwithstanding it remains in such safe until after loss.

ERROR to the district court for Gage county. Tried below before BROADY, J.

R. S. Bibb (*N. T. Gadd* with him), for plaintiff in error:

The agreement between Gadd and Meier, that the former was to be substituted as the debtor of the company without

its knowledge, does not constitute a payment of the premium. (*McCormick v. Keith*, 8 Neb., 145; *Stoll v. Sheldon*, 13 Id., 209; *Phillips v. Mayer*, 7 Cal., 81; *Berthuff v. Quinlan*, 68 Ill., 297; *Graydon v. Patterson*, 13 Ia., 256; *Drain v. Doggett*, 41 Id., 682; *Aultman v. Lee*, 43 Id., 404; *Benny v. Rhodes*, 18 Mo., 147; *Wheeler, etc., Co. v. Givan*, 65 Id., 89; *Higgins v. Moore*, 34 N. Y., 422; *Stewart v. Woodward*, 50 Vt., 81; *Hall v. Storrs*, 7 Wis., 253; *Huffman v. Ins. Co.*, 92 U. S., 161; *Kingston v. Kincaid*, 1 Wash. [C. C.], 454; *Dunlap's Paley on Agency*, 291*; *Story on Agency*, secs. 90, 181; *Benjamin on Sales*, sec. 1099.) There was no valid contract, as the risk had not been accepted nor the policy delivered. (*Continental Ins. Co. v. Jenkins*, 5 Ins. Law Journal [Ky.], 514; *Buffum v. Fayette Fire Ins. Co.*, 3 Allen [Mass.], 360; *Wallingsford v. Home Mutual Ins. Co.*, 30 Mo., 46; *Patterson v. Ben Franklin Ins. Co.*, 5 Ins. Law Journal [N. Y.], 123; *Taylor v. Phoenix Ins. Co.*, 47 Wis., 365; *Mattoon Mfg. Co. v. Oshkosh Mutual Fire Ins. Co.*, 69 Wis., 564.) Written notice of loss was not given in this case, and is a condition precedent to recovery. (*McCann v. Aetna Ins. Co.*, 3 Neb., 207, and cases cited; *Columbian Ins. Co. v. Lawrence*, 2 Pet. [U. S.], 53, 10 Pet., 513; *Haff v. Marine Ins. Co.*, 4 Johns. [N. Y.], 135; *Brink v. Hanover Ins. Co.*, 70 N. Y., 594, and cases cited; *Owen v. Farmers' Ins. Co.*, 57 Barb., [N. Y.], 521; *Dohn v. Farmers' Ins. Co.*, 5 Lans. [N. Y.], 275; *Inman v. Western Fire Ins. Co.*, 12 Wend. [N. Y.], 456; *Planters' M. I. Co. v. Deford*, 38 Md., 400; *Smith v. Haverhill M. F. Ins. Co.*, 1 Allen [Mass.], 297; *Johnson v. Phoenix Ins. Co.*, 112 Mass., 49; *Protection Ins. Co. v. Pherson*, 5 Ind., 417; *Edgerly v. Farmer's Ins. Co.*, 43 Ia., 587; *Germania Ins. Co. v. Curran*, 8 Kan., 9; *Leadbetter v. Aetna Ins. Co.*, 13 Me., 265; *McPike v. Western Assurance Co.*, 61 Miss., 37; *Troy Fire Ins. Co. v. Carpenter*, 4 Wis., 25; *Wright v. Ins. Co.*, 36 Wis., 522; *Flanders, Insurance*, 573; *May, Insurance*, sec.

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465; Wood, Insurance, sec. 411, 416). None of the conditions precedent were waived. (*Barr v. Council Bluffs Ins. Co.*, 41 N. W. Rep. [Ia.], 374; *Smith v. Niagara Fire Ins. Co.*, 15 Atl. Rep. [Vt.], 353; *Hankins v. Rockford Ins. Co.*, 35 N. W. Rep. [Wis.], 34.) The occupancy of the risk was changed.

Pemberton & Bush, contra:

A denial of the contract waives the right of insisting on a performance of its conditions. (*School District v. Holmes*, 16 Neb., 486; *Dinsmore v. Stibbert*, 12 Id., 433; *Carson v. German Ins. Co.*, 62 Ia., 433; *Boyd v. Ins. Co.*, 70 Id., 325; *Kansas Protective Union v. Whitt*, 36 Kan., 760; *Phoenix Ins. Co. v. Shiers*, 8 S. W. Rep. [Ky.], 453; *Tuyloe v. Merchants' Fire Ins. Co.*, 9 How. [U. S.], 390, 403; *King v. Hekla Fire Ins. Co.*, 58 Wis., 508 [17 N. W. Rep., 297]; *Lazensky v. Sup. Lodge*, 31 Fed. Rep., 592; *Unsell v. Hartford Ins. Co.*, 32 Id., 443; *Commercial Union Ins. Co. v. Seammon*, 12 N. E. Rep. [Ill.], 324; *Travelers' Ins. Co. v. Harvey*, 5 S. E. Rep. [Va.], 553; *Fireman's Ins. Co. v. Floss*, 10 Atl. Rep. [Md.], 139.) Delivery was completed by leaving the policy with the agent, Gadd. (*Sheldon v. Conn. M. L. Ins. Co.*, 25 Conn., 207; 65 Am. Dec., 565; *Bodine v. Exch. F. Ins. Co.*, 51 N. Y., 117; *Ins. Co. v. Colt*, 20 Wall. [U. S.], 560.) The authority of insurance agents, such as the agents in this case, is general and they have the power to waive the payment of the premium even though the policy provide that they shall not have such power. (*Young v. Hartford F. Ins. Co.*, 45 Ia., 377; 24 Am. Rep., 784; *Sheldon v. Conn. M. L. Ins. Co.*, *supra*; *Bouton v. American Ins. Co.*, 25 Conn., 542; *Boehen v. W. C. Ins. Co.*, 35 N. Y., 131; *Sheldon v. Atlantic F., etc., Co.*, 26 N. Y., 460; 84 Am. Dec., 213, and note; *Trustees v. Brooklyn Ins. Co.*, 19 N. Y., 305; *Bowman v. Agr. Ins. Co.*, 59 N. Y., 521; *Bodine v. Exch. F. Ins. Co.*, *supra*; *Goit v. U. P. Ins. Co.*, 25 Barb. [N. Y.], 189; *Miss. Valley*

Ins. Co. v. Neyland, 9 Bush. [Ky.], 430; *Southern L. Ins. Co. v. Booker*, 9 Heisk. [Tenn.], 606; 24 Am. Rep., 344; *Murphy v. Southern L. Ins. Co.*, 3 Baxt. [Tenn.], 440; 27 Am. Rep., 761; *Miller v. Life Ins. Co.*, 12 Wall. [U. S.], 285; May, Insurance, secs. 134, 360; *White v. Conn. F. Ins. Co.*, 120 Mass., 330; *Wooddy v. Ins. Co.*, 31 Gratt. [Va.], 362; 31 Am. Rep., 732, 736; 4 Wait's Act. & Def., 30.) The policy could not be canceled after execution without notifying the insured himself—not simply his agent. (*Body v. F. Ins. Co.*, 63 Wis., 157; *Chadbourne v. German Am. Ins. Co.*, 31 Fed. Rep., 533.)

REESE, CH. J.

This action was instituted for the recovery of an amount alleged to be due defendant in error upon a policy of insurance, it having been alleged in the petition that on the 8th day of December, 1886, plaintiff in error, in consideration of the sum of \$40 premium paid it by defendant in error, executed its policy of insurance upon one frame building and certain personal property therein contained, and which said insured property was consumed by fire on the 3d day of February, 1887, due notice of which had been given to plaintiff in error.

The answer consisted of a number of defenses, which we set out at some length in order to have a proper understanding of the questions presented for decision.

The first paragraph of the answer was as follows: "Now comes the defendant and for answer to plaintiff's amended petition herein filed, says: That it denies that on the 8th day of December, 1886, it executed and delivered to the plaintiff herein a policy of insurance upon the house and property of said plaintiff for the sum of \$600 upon the house and the sum of \$400 upon the saloon fixtures, stove, chairs, and tables, etc., or for any amount upon any property of plaintiff as alleged by the plaintiff in his petition in this action. And the defendant further an-

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swering says that it denies that this plaintiff, on said 8th day of December, 1886, or at any time prior or subsequent thereto, paid to this defendant any premium on any policy or contract of insurance, and the defendant denies that any contract of insurance was entered into between plaintiff and defendant wherein or whereby this defendant agreed to become or did become liable to the plaintiff for any loss by fire that the plaintiff might sustain to the property described in his said petition as alleged in said petition. And defendant denies that it is indebted to the plaintiff in any sum whatsoever."

By the next paragraph of the answer it was alleged that in all of the contracts of insurance issued by plaintiff in error, and in all of the forms of policy generally used by it in its fire insurance business, was a condition that if during the time of insurance covered by the policy the occupation of the premises assured be changed, then and from that time thenceforth, so long as said occupation should continue changed, the policy and contract of insurance should cease and be of no force and effect, except there should be a special agreement in writing on the policy that the insurance should remain in force, notwithstanding the change in the occupancy of the property; that at the time of the alleged insurance the property which was described in the petition was used and occupied as a warehouse, and during the interval between the date of the alleged insurance and the date of the alleged fire the occupancy of the property was changed from that of a warehouse to a dwelling house, and that the property was so occupied at the time of its alleged destruction, and "that there was no agreement in writing in any policy of insurance issued by plaintiff in error to defendant in error, or otherwise, wherein plaintiff in error agreed to insure the premises or property therein contained, as alleged by plaintiff, during the time the premises were so occupied as a dwelling house, and defendant alleges that it was never

agreed in writing or otherwise that there might be a change of occupancy in the said premises."

It was further alleged that in the forms of policy generally used by plaintiff in error, in its insurance business, and in all of its contracts of insurance, there was a condition that persons sustaining loss or damage by fire should forthwith give notice in writing of said loss to the company, and within thirty days thereafter render a particular and specific account of the loss, signed and sworn to by the assured, and that no notice had been given, or proof of loss furnished as provided by said policy.

The answer also contained a general denial of all the allegations of the petition not admitted.

By the reply all the allegations of new matter contained in the answer were denied, and it was alleged that at the time of the insurance the building insured was occupied, and that by the consent of plaintiff in error defendant in error moved into it and occupied it as a residence for himself and family.

It was further alleged that "as to the proof complained of in said answer not being forwarded in thirty days * * defendant denied the insurance and liability to the plaintiff."

A jury trial was had which resulted in a verdict in favor of defendant in error, finding that there was due to him from plaintiff in error the sum of \$1,084.37. A motion for a new trial was filed and overruled and judgment was rendered upon the verdict for the amount found due.

The motion for a new trial filed in the district court, and the petition in error filed in this court, each consists of a number of assignments of error, but it is not deemed necessary to notice all in the order presented, as they may be sufficiently considered by following the methods adopted by the parties in their briefs.

It is contended by plaintiff in error that the premium of \$40 was never paid, nor a waiver of such payment made, and that therefore no contract of insurance was entered into.

As we have already seen, the answer of plaintiff in error consisted of a denial of the contract of insurance "*as alleged in said petition.*" This, under the rule stated in *Har-den v. A. & N. R. R. Co.*, 4 Neb., 521, does not amount to a denial of the execution of the policy nor of the existence of the contract of insurance, but is in effect an admission thereof, and upon this alone this part of the case would have to be decided against plaintiff in error.

But conceding the answer to be sufficient to create an issue upon the question of the execution and delivery of the policy by plaintiff in error, we think it is sufficiently shown that a contract of insurance was made.

At the commencement of the trial defendant in error called as his first witness Mr. N. T. Gadd, who was the agent of plaintiff in error, through whom the policy of insurance was issued. We here copy a portion of his testimony:

Q. You may state where you live, and what is your business.

A. I live at Liberty, and am an attorney.

Q. Where were you living on December 8, 1886?

A. Living at Liberty, Nebraska.

Q. State if at that time you were in any way engaged in business for defendant in this action.

A. With Mr. Nouse I was engaged in transacting insurance business—the firm of Nouse & Gadd.

Q. In what capacity were you engaged at that time?

A. I was their agent. I was their local agent.

Q. State whether or not you were what was called an insurance company's recording agency.

A. We were.

Q. State what authority you had as recording agency as to writing policies.

A. We had authority to write policies, subject, however, at the same time, to the approval of the company.

Q. You had authority to write policies?

A. Yes.

Q. State if on that day you had any transaction with the plaintiff by issuing by the defendant a policy to him.

A. We did.

Q. State if you wrote a policy for him or there was one written in your office.

A. There was one written in the office.

Q. State if you have that policy with you.

A. No, sir; I've not got it.

Q. (Handing witness Exhibit "A.") Examine that, and state if that is the policy that was written at that time.

A. Yes.

Q. In whose handwriting is this policy?

A. in the writing of S. E. Clapp.

Q. Who was S. E. Clapp.

A. He was clerking for the firm of Nouse & Gadd at that time.

Q. You may state whether or not he did the business, or whether you did the business in reference to writing up this policy and the contract for the same.

A. Mr. Clapp wrote the policy; I suggested a word or two in the policy, and I suppose the contract was talked over with Meier, by me and Meier, and I don't know whether Clapp had anything to do with it or not. I don't know whether Clapp took any part in it or not.

Q. You may state if at that time there was a record made upon the books of the company.

A. Yes.

Q. Who made the record.

A. Mr. Clapp.

Q. State to the jury what the number of this entry is in the book.

A. Registry entry for policy for 1074.

Q. You say this entry was made at the time?

A. Yes.

There was sufficient proof submitted to the trial jury to

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justify a finding that the policy was written and delivered to defendant in error, but that after such delivery he returned it to the agent of plaintiff in error with a request that it be retained in a safe in the office of such agent with some papers which belonged to defendant in error, until he should call for it. If this was true, of which the jury were the sole judges, the delivery of the policy was complete. (*Insurance Co. v. Colt*, 20 Wall., 560; *Bodine v. Ins. Co.*, 51 N. Y., 117; *Sheldon v. Ins. Co.*, 25 Conn., 207).

It is further contended that no premium was paid for the insurance and that therefore the policy was not binding on plaintiff in error. The evidence, on the part of the defendant in error, submitted to the jury, was to the effect that the agent of plaintiff in error had money in his possession belonging to defendant in error, the same having been previously collected by such agent ~~by~~ defendant in error, and that that money to the extent of the premium was applied in payment thereof. This, if true, would be a payment, as it is not denied that the agent had the right to collect and remit premiums. This was a sufficient payment of the premium; but had this not been true the delivery of the policy would have been a waiver of the cash payment. (*Boehen v. Ins. Co.*, 90 Am. Dec., 787 [S. C., 35 N. Y., 131], and note at end of case.)

It is next contended that the proof of loss was not made in compliance with the terms of the policy, and that for that reason defendant in error cannot recover. This contention must be met by saying that by the denial of the contract, and of all liabilities thereunder, plaintiff in error waived the right to insist upon the failure of proof of loss as a further defense. It would be idle to go to the trouble and expense of making such proof when all obligation under the contract of insurance was denied by the company sought to be charged thereby. (*Taylor v. Ins. Co.*, 9 How. [U. S.], 390; *Carson v. Ins. Co.* 62 Ia., 433; *Ins. Co. v. Scammon*, 12 N. E. Rep. [Ill.], 324; *King v. Ins. Co.*, 58

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Wis., 508 [S. C., 17 N. W. Rep., 297]; *Kansas Protective Union v. Whitt*, 36 Kan., 760; *Phoenix Ins. Co. v. Spiers*, 8 S. W. Rep., [Ky.], 453.)

On almost every material part of the case the evidence was conflicting, but there was sufficient introduced by defendant in error to sustain the finding of the jury, and in such case the verdict cannot be molested by this court.

Upon the matter of the alleged change of the occupancy of the insured property there was evidence tending to show that at the time of the insurance the house was occupied as a billiard room, or in which to store billiard tables and other saloon property; but that thereafter the defendant in error obtained permission from the agent of plaintiff in error to go into the building and occupy it as a dwelling, and that it was so occupied at the time of its destruction by fire, with the knowledge and consent of the agent. This being true, the policy was not avoided thereby.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

WILLIAM VINNEDGE ET AL. V. CHARLES NICHOLAI.

[FILED DECEMBER 4, 1889.]

1. **Replevin: JURISDICTION.** Upon the commencement of an action in replevin plaintiff filed with the clerk of the district court an affidavit that the suit was against the sheriff and there was no coroner in the county, and asking the appointment by the clerk of a third party to serve the process. The clerk appointed the person whose name was suggested by plaintiff in the affidavit, and the person so deputed served the summons and executed the order of replevin, making his return under oath. At the next term of the district court the defendant appeared generally

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and by motion, and moved the court for leave to make proof of the value of the property seized and his damages by reason thereof and for a dismissal of the case, which motion was overruled. *Held*, No error, the jurisdiction of the court not having been questioned nor attacked.

2. — : AFFIDAVIT: AVERMENT OF TITLE PRIMA FACIE GOOD. The affidavit in replevin containing an averment that plaintiff was the owner and entitled to the immediate possession of the property constituting the subject of the action was *prima facie* good, as an allegation of absolute ownership—notwithstanding such ownership was alleged to have been based upon a chattel mortgage—when attacked by a motion in the nature of a demurrer.

ERROR to the district court for Loup county. Tried below before HARRISON, J.

A. S. Moon, for plaintiff in error, cited: *Cropsey v. Averill*, 8 Neb., 151; *Fox v. Abbott*, 12 Id., 331; *R. V. R. Co. v. Sayer*, 13 Id., 282; *Newlean v. Olson*, 22 Id., 719; Wells on Replevin, secs. 388, 394; 2 Sutherland on Damages, pp. 8, 46.

A. M. Robbins, *contra*, cited: *Orr v. Seaton*, 1 Neb., 107; *Cropsey v. Wiggenghorn*, 3 Id., 117; *Crowell v. Galloway*, Id., 219; *Kane v. People*, 4 Id., 512; *Aultman v. Steinan*, 8 Id., 113; *Burnham v. Doolittle*, 14 Id., 215; *White v. Merriam*, 16 Id., 96; *Thraillkill v. Daily*, Id., 116.

REESE, CH. J.

This was an action of replevin. Defendant in error filed his petition and affidavit in replevin in the district court and at the same time his attorney filed an affidavit showing that the action was against the sheriff of the county, that there was no coroner, and asking that James Walker be appointed to serve the summons and execute the order of replevin. The summons and order of replevin were duly issued and the clerk appointed said Walker to make the service and ex-

ecute the order as desired. The person thus appointed made the service and executed the order in accordance with the forms of law, making his return under oath. At the next term of the district court, plaintiffs in error, who were defendants in that court, filed their amended "motion to dismiss" the action, which was as follows:

"Come now the defendants in the above action and move the court to hear proof of the value of the property and damages sustained by defendant and to render a judgment in favor of the defendant and dismiss this action for the following reasons, to-wit:

"1. Because the affidavit does not sufficiently describe the property.

"2. Because the facts stated in the affidavit do not show that the plaintiff is entitled to the possession of the property.

"3. Because the writ was not served nor the property taken by any person authorized by law.

"4. Because the order of replevin was not directed to any person authorized by law.

"5. Because no bond was given as required by law."

"6. Because the property was not appraised as required by law."

The motion was overruled and plaintiffs in error declining to answer or further plead, a trial was had in their absence and judgment was rendered in favor of defendant in error. Plaintiff in error brings the cause to this court by proceedings in error, alleging as such error the decision of the district court upon the motion.

It will be observed that the first and second grounds assigned in the motion are in the nature of a demurrer to the affidavit in replevin. That portion of the affidavit which was particularly assailed was to the effect that the plaintiff was "the owner of and entitled to the immediate possession of the following described goods and chattels, to-wit: Thirteen pigs, as follows, to-wit: eight sows and five barrows of about one hundred and fifty pounds weight each. That said

ownership is claimed and held under a chattel mortgage executed by Eugene A. Post, to this plaintiff, dated January 18th, 1889, and duly on file in the county clerk's office of Loup county, Nebraska, of date —, of the value of \$125," etc.

By the language of the affidavit it was alleged that defendant in error was the owner of and entitled to the possession of the property in dispute. Whether the evidence upon the trial sustained the averment of absolute ownership, we have no means of knowing, as there is no bill of exceptions presented to this court, but the presumption is it did. However, it is enough here to say that as assailed the affidavit was sufficient on its face.

The principal contention of plaintiff in error is that the clerk had no power to appoint or depute Walker to serve the summons and execute the order of replevin, and that, therefore, the seizure and appraisement of the property, its delivery to defendant in error, and the approval of the replevin bond were without authority of law on the part of Walker, and were therefore void. This argument is based largely upon the assumption that there was, in fact, no action pending in court, and therefore there was no jurisdiction to act.

Without inquiring as to the regularity of the appointment of Walker, or of his action under the alleged appointment, it must be sufficient to say that an action was pending which had been regularly instituted by the filing of the necessary pleadings and the issuance of the proper process. The court had jurisdiction of the person of plaintiff in error by his general appearance, if not by the service, and in the absence of an attack upon, or a challenge of such jurisdiction, the judgment would be binding. This jurisdiction was not questioned. No effort was made to quash the service, nor the return of the summons or order of replevin. They were permitted to stand unquestioned, and by virtue of them plaintiff in error sought to make

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proof of the value of the property replevined, and of his damages, and to obtain a judgment therefor. This could not be done. Had the appointment of, and proceedings by, Walker been attacked by the proper motion to quash, a different question would perhaps have been presented; but as the record stands the district court did not err in overruling the motion.

The judgment is affirmed.

JUDGMENT[†] AFFIRMED.

THE other judges concur.

ABIJAH RICHARDSON V. MARIA STONE ET AL.

[FILED DECEMBER 4, 1889.]

1. **USURY: EVIDENCE: REVIEW.** In an action to foreclose a real estate mortgage, by the transferee of the note and mortgage, the defense was that the only consideration for the note was usurious and unlawful interest promised upon a loan of \$1,000, and a denial of the purchase by plaintiff of the note for value before maturity, and without notice of defenses. Upon the trial it was stipulated and agreed in open court, that if a certain witness were present he would testify "that the entire consideration for which the note and mortgage were given was for usurious interest on the loan of money" referred to. No evidence was offered for the purpose of contradicting the fact. Upon appeal to the supreme court it was *held* that objections could not be there made for the first time to the evidence as the statement of a conclusion, and not of the existence of facts from which the conclusion could be drawn.
2. ———: **BONA FIDE HOLDER.** The evidence examined and found to sustain a finding, that the plaintiff had not shown himself to be a *bona fide* holder of the note.

APPEAL from the district court for Johnson county.
Heard below before BROADY, J.

28	137
39	667

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L. C. Chapman, for appellant, cited: *N. E. Mtg. Security Co. v. Sandford*, 16 Neb., 691; *Richardson v. Doty*, 25 Id., 420; *Colebrooke*, *Collateral Securities*, sec. 138; *Smyth v. Munroe*, 84 N. Y., 354; *Weyh v. Boylan*, 85 Id., 394; *Ashton's Appeal*, 73 Pa. St., 153.

A. M. Appelget, and *S. P. Davidson*, *contra*, cited: 1 *Daniel*, *Negotiable Instruments*, 862; *Jaqua v. Montgomery*, 33 Ind., 46; *B. & M. R. Co. v. Dick*, 7 Neb., 245.

REESE, CH. J.

This was an action for the foreclosure of a real estate mortgage given to secure the payment of five promissory notes for seventy dollars each, payable to the order of P. D. Cheney, dated July 16, 1872, and all of which were alleged to have been previously paid, except the last of said series of notes, and which matured on the 16th day of July, 1877. The mortgage and note were executed by defendants Maria Stone and B. F. Stone, her husband. Subsequent to the execution of these papers they had sold and conveyed the real estate to defendant Davidson, with an agreement to present, and make the defenses presented in this case. The action was instituted by plaintiff and appellant, who claimed to be an innocent purchaser of the note in the due course of trade, and before maturity.

Maria Stone filed her answer to the petition denying that plaintiff was the *bona fide* holder of the note, or that he purchased the same before maturity, and without notice of her defenses, alleging that the only consideration for the note was usurious interest on a loan of \$1,000 obtained from P. D. Cheney and B. Murray, Jr., at 17 per cent interest, and that the debt was barred by the statute of limitations. There were other allegations in the answer, but which need not now be noticed. The execution of the note and mortgage was admitted. The reply consisted of a general denial.

The same was tried to the district court, the trial resulting in a general finding and decree in favor of defendants. From this decree plaintiff appeals.

There is practically no dispute but that the only consideration for the note was usurious interest (over and above the legal rate), contracted and agreed to be paid at the time of the loan for \$1,000 referred to above. Upon the trial the following admission was made in open court: "It is admitted that if the witness, B. F. Stone, were present he would testify in this case that the entire consideration for which the note and mortgage was given, was for usurious interest on a loan of money obtained from one Byron Murray, Jr., and that the statement of what this witness would swear to may be used as evidence on the trial of this case. It is further agreed that the notes and mortgage set out in plaintiff's petition were made as there set out and that they are true and correct."

It is now contended that the statement agreed to would have been only the conclusion of the witness if testified to, and that therefore it was not proof of the fact of usury. While it is perhaps true that had the witness been called for the purpose of proving the fact of usury, and had objection been made to the method of proof, he would have been required to state the facts, and from such facts the conclusion could have been drawn; no objection was offered to that part of the stipulation upon the ground stated. The court and counsel accepted it as proof of the fact. No effort was made to prove a different state of facts. It must now be accepted as true.

The next question presented for consideration is as to whether plaintiff was entitled to protection as an innocent purchaser of the note. Upon this part of the case the evidence was conflicting. Plaintiff testified in his deposition, which was read in evidence, that he purchased the note for value and without notice of any defense, in May, 1876; that he was wholly unacquainted with the defendants and

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purchased upon the representation that the note was well secured and upon the written statement accompanying it, signed by defendants, that they had "no defense, set off, or claim whatever in law or equity to make against said notes and mortgage."

As against this there was evidence submitted on the part of defendants that in the month of May, 1878, one Davis, by his attorney instituted a suit on the same note and mortgage involved in this action, in the circuit court of the United States for the district of Nebraska, the object and purpose of the action being a foreclosure of the mortgage. This evidence consisted of the testimony of Judge Appelget and of plaintiff's attorney, who show quite clearly that the notes involved in the two actions were one and the same. In addition to this, the note shows to have been trimmed and torn in such a way as to excite a suspicion that something had been cut and torn off which it was not desired should appear thereon. The burden of proof being upon the plaintiff to show that he was an innocent holder of the note by purchase for value before maturity, and without notice of defenses (*Wortendyke v. Meehan*, 9 Neb., 229), the finding of the district court that he had failed to establish the fact cannot be molested.

Upon consideration of the whole case we are satisfied that the decree of the district court was correct. It is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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JOSIAH W. ROGERS V. GEORGE SAMPLE ET AL.

[FILED DECEMBER 4, 1889.]

1. **JURORS: SEPARATION BEFORE RETURNING VERDICT.** It is no cause for setting aside the verdict of a jury that when agreed it is written and sealed and the jury separate, by agreement of the parties, if afterwards they come into court and report the sealed verdict. (See *Suttiff v. Gilbert*, 8 Ohio, 405.)
2. **Insufficient Verdict: CORRECTION.** In all cases where a verdict as returned into court is insufficient in substance or form, the court has power to send the jury back to correct it.
3. **Replevin.** In an action of replevin in a justice's court or a county court, where the jury find for the plaintiff and assess his damages for the wrongful detention of the property by the defendant, it is unnecessary for them to find whether the plaintiff has the right of property or the right of possession therein.

ERROR to the district court for Douglas county. Tried below before GROFF, J.

J. W. Rogers, and *Park Godwin*, for plaintiff in error:

No verdict can be corrected after the jury's discharge. (*Davis v. Neligh*, 7 Neb., 78; *Longfellow v. State*, 10 Id., 105; Code, secs. 290, 291.) The verdict in this case is inconsistent and no valid judgment can be founded upon it. (*Hewson v. Saffin*, 7 Ohio, 587; *Meredith v. Kennard*, 1 Neb., 316.) The judgment should have been for the plaintiff. (*Mercer v. James*, 6 Neb., 412; *Eiseley v. Malchow*, 9 Id., 181; *Leighton v. Stuart*, 10 Id., 226; *Degering v. Flick*, 14 Id., 450.)

Geo. F. Brown, contra:

There was no discharge of the jury and the separation of the jurors was not improper. (*Suttiff v. Gilbert*, 8 Ohio, 405.) *Davis v. Neligh*, 7 Neb., 78, if applicable at all, tends to support the contention of defendants in error.

The decision in *Longfellow v. State* has no reference to civil actions.

COBB, J.

This case is brought on error from the district court of Douglas county. The plaintiff in error sued out a writ of replevin in the county court of said county against the defendants, alleging that he had special ownership in and was entitled to the possession of the following property: One large sorrel horse, seven years old, with white stripe in forehead, of value \$130; one dark brown stallion, eight years old, medium size, of value \$80; one small sorrel mare, five years old, white in the face, of value \$75; one bay mare, five years old, of small size, of value \$90; one other bay mare, of same description, of value \$90; one sorrel mare, six years old, of value \$90; and one set of double harness, of the value of \$30; total value, \$585. That defendants have wrongfully detained said property, to his damage to the amount of \$5, and prays judgment for the delivery of the property, or for the value thereof, and for his damages.

Of this writ the officer made return, November 7, 1887: "Replevied the within described goods and chattels and caused them to be appraised by two responsible persons of said county, whose valuation in writing is herewith returned, and have taken the undertaking of Andrew Murphy, surety for defendants, in the sum of \$800, which is herewith returned, and have delivered the property to the plaintiff and have served copies of this writ on defendants."

The defendants appeared and answered by their attorneys.

There was a trial to a jury, and it was agreed by the parties that when the jury made their verdict the same be sealed and delivered to the constable and officer in charge of the jury; in pursuance of which the following verdict was rendered and delivered:

Rogers v. Sample.

"We, the jury, duly impaneled and sworn to try the issue between the said parties, do find for the plaintiff and do assess his damages at the sum of one dollar, and the return of all the horses in dispute to Lucian Woodworth, excepting the horse known as the Howard horse.

"(Signed) E. R. RINGER, *Foreman*."

And the said verdict being irregular, and the jury not being present, the court ordered the jury to be brought in at two o'clock P. M. to make their verdict regular, to which the plaintiff excepted. The jury having appeared, they were sent to the jury room, and returned into court their corrected verdict, adding to their former verdict the words, "the value of said horses to be returned is \$330," which was signed by their foreman.

On which verdict judgment was rendered that the plaintiff return the horses replevied to the defendant Woodworth, excepting only that known as the Howard horse, and that if return cannot be made, the defendant Woodworth recover against the plaintiff the sum of \$329, the value of the property, less the amount of plaintiff's damages found by the verdict, and that each party pay his own costs, taxed at \$14.85 and \$10.55 respectively.

Which judgment and proceedings were taken to the district court of said county to be reviewed on the following errors:

1. In recalling the jury, on the day after the trial, after they had given their verdict and had been discharged and dispersed.
2. In receiving the second verdict, and in so doing acted without jurisdiction.
3. In rendering judgment on the pretended second verdict after recalling the jury, which, after being discharged, had no jurisdiction or authority in law to find any other or separate or different verdict from that first found.
4. In not finding judgment on the first verdict found, and sealed and delivered to the court, and announced to the parties to the suit.

5. In overruling the objection of the plaintiff to the recalling of the jurors and of their action in the case.

The defendants in error having been duly served by *mesne* process the cause was argued in error to the district court and on consideration the court found no error in the proceeding in the record of the court below, which was affirmed with costs.

This case presents two questions: First, Was the verdict void by reason of the facts connected with its finding? and Second, Was it sufficient in form and substance to support the judgment of the court?

As to the first point: The judgment of the district court, in denying the petition in error, is fully sustained by the authority of the supreme court of Ohio, in the case cited by counsel for defendant in error, *Sutliff v. Gilbert*, 8 Ohio, 405, a case precisely in point. Again, it appears from the record that, when the case was submitted to the jury, it was mutually agreed by the parties that when the jury should make up their verdict, the same should be sealed and delivered to the officer in charge of the jury. The object of this agreement was obviously to relieve the jury of the necessity of remaining out all night, or of having the court and parties recalled to the court house, probably in the middle of the night, to receive the verdict; and it comprehended the possible necessity of doing precisely that which was done, the recalling of the jury and sending them back to put their verdict in proper form. This is a matter of daily occurrence, or once was, in district courts and is possible in every case where parties agree that a jury may seal their verdict.

The second question must be decided upon a construction of the statute. There can be no dispute that the provisions of the statute for the government of justices of the peace, in actions of replevin, are also applicable to such actions in county courts. These provisions, so far as they relate to the verdict and judgment, are contained in sec-

tions 1041 and 1042 of the Civil Code. Those of the latter section only are deemed applicable to the case at bar; I quote the section: "Sec. 1042. In all cases where the property has been delivered to the plaintiff, where the jury shall find for the plaintiff on trial, or on inquiry of damages they shall assess adequate damages to the plaintiff for the illegal detention of the property, for which with costs of suit the justice shall render judgment against the defendant."

In the case at bar, the property had been delivered to the plaintiff, and the jury found for the plaintiff on the trial. They assessed damages to the plaintiff, with which sum he seems to have been satisfied. The verdict, then, possesses all of the elements necessary to sustain a judgment in favor of the plaintiff for the sum of one dollar damages and costs of suit. But no judgment for either damages or costs was rendered for the plaintiff below or against the defendant in error.

There is no bill of exceptions in this case as it comes to this court, nor does it appear that there was one as it was considered in the district court; neither was the answer of the defendants returned with the transcript. The affidavit in replevin and the verdict of the jury, together with the formal petitions in error, are all that come before us. From the affidavit in replevin it appears that the plaintiff claimed to have a special ownership in, and to be entitled to, the possession of six horses and one set of harness, and that the defendants wrongfully detained said property, to his damage of the sum of five dollars. In addition to what is stated above, it does appear by the return of the order of replevin by the officer, that all of said property was taken by him and delivered to the plaintiff, he giving bond therefor in the sum of \$800, said property having been previously appraised in accordance with the statute. It is fairly inferable from the verdict that the jury, in fact, found that the plaintiff was the owner of one of said

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horses, or, at least, was entitled to the possession of one of them, and that he was damaged to the amount of one dollar by its unlawful detention by the defendants, but that the defendants, from whose possession all of said property had been replevied, were entitled to a return of all the balance thereof. Upon the verdict, as set out in the statement, the court rendered judgment in favor of the defendant for a return to him by the plaintiff of all of said property, except one horse described by name, and that if such return could not be made, then for the sum of three hundred and twenty-nine dollars, the value of said property, less the sum of one dollar allowed as damages to the plaintiff by the terms of the verdict. While it must be confessed that these proceedings in the county court cannot be held up as a model for the forms of jurisprudence, I see no error in them of which the plaintiff in error can take advantage by this proceeding.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

J. P. GIBBONS V. HARLAN P. SHERWIN ET AL.

[FILED DECEMBER 4, 1889.]

1. Instructions given and refused examined, and *held*, no error in such giving and refusal.
2. A written instrument set out in the opinion construed, and *held*, to evidence a sale, and not merely an option to purchase.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

J. R. Webster, for plaintiff in error:

An instruction is erroneous which tends to mislead the jury or withdraw from it a question of fact. (*Esterly v. Van Slyke*, 21 Neb., 614; *Severance v. Melick*, 15 Id., 614; *Harison v. Baker*, Id., 46; *Meredith v. Kennard*, 1 Id., 319.) A party has a right to have instructions given without modification when they are proper and not covered by other instructions. (*Severance v. Melick*, *supra*; *Housel v. Thrall*, 18 Neb., 488; *Matthewson v. Burr*, 6 Id., 320.)

I. W. Lansing, and Robert Ryan, contra :

The instructions given omit no points asked by plaintiff in error and are as favorable to him as the law of the case would warrant. (*Love v. Miller*, 53 Ind., 294; *Phillips v. Morrison*, 3 Bibb [Ky.], 105; *Atkinson v. Brown*, 20 Me., 67; *Atwood v. Cobb*, 16 Pick. [Mass.], 227; *Moses v. Bierling*, 31 N. Y., 462; *Wylie v. Bank*, 61 Id., 416; *Clendenan v. Pancoast*, 75 Pa. St., 213; *McArthur v. Slason*, 53 Wis., 41; *McGavock v. Woodlief*, 20 How. [U. S.], 221.)

COBB, J.

This cause was brought on error to review the judgment of the district court of Lancaster county.

The plaintiffs below, Harlan P. Sherwin, Frank Sherwin, and James H. Pinkerton, partners under the name of Sherwin, Sherwin & Co., doing business as real estate agents at Lincoln, Nebraska, complained of J. P. Gibbons, defendant, that on April 1, 1887, the defendant placed with them as agents certain real estate, to-wit: Ten acres of land out of the southwest quarter of section 18, town 10, range 7, in said county, with instructions to sell the same on the following terms: \$15,000; \$500 cash, \$1,750 in fifteen days, \$1,000 in thirty days, \$1,500 in sixty days, \$1,500 in ninety days, \$2,000 in four months, and the balance to remain as a deferred payment on the land. The

plaintiffs sold the same in the early part of April, 1887, upon the terms authorized, and became entitled to receive \$400 as commission for their services, which they demanded, and which the defendant refused to pay, and they pray judgment for the amount with interest.

The defendant answered and denied each and every allegation in the petition contained; and, for a second defense, set up that on April 1, 1887, he placed the premises for sale with the plaintiffs at other and different terms than those stated by plaintiffs, calling for much larger cash payments than therein alleged; that on the 3d or 4th day of April plaintiffs, by telegraph, falsely stated to the defendant that they had sold said premises under the terms fixed by defendant, and called him to Lincoln from the county of Saunders, and informed him that Mrs. L. W. Colby, and Isabel Bond were in treaty jointly to purchase the premises, but on different terms than stated, with a small cash payment of only \$500 on a sale at \$15,000, and on the representations of the plaintiffs respecting the ability of Colby and Bond to perform their contract, he authorized the plaintiffs to make a sale to them, if the same were done on their proposal, and he informed thereof by 12 M., April 6, 1887; that afterwards Colby receded from her proposal, and refused to join with Bond in the purchase, and the plaintiffs, without authority, then attempted to perfect the transaction on such special terms with Bond alone as the purchaser. Nor did they inform defendant of such attempted sale by noon of April 6, following, but later in the day informed defendant that the terms, specially by him made, had been accepted, and transmitted a draft for \$500, as paid by the purchasers, inducing defendant to come to Lincoln and complete the transaction, and, when defendant arrived at Lincoln and ascertained the true state, he refused to consummate or accept the proposal to sell the premises on such terms to Isabel Bond alone, and wholly terminated the plaintiffs' agency, and returned

to Bond her draft, which she accepted, by which no commissions were ever earned or due to plaintiffs.

And for a third defense, and for affirmative relief, the defendant says that on April 3, 1887, the plaintiffs, being their agents to sell certain real estate of defendant according to the terms to them given, falsely informed defendant that said premises had been sold under their agency, and requested defendant to come to Lincoln to consummate such sale, which defendant at great expense, on the faith of such false reports from them, did, and afterwards on April 6, 1887, in violation of instructions to them, they pretended to sell said premises to Isabel Bond, and again falsely informed defendant that they had sold the premises in accordance with instructions under a proposal communicated to him under their first false report aforesaid; and thereby again induced the defendant to come to Lincoln, at great expense, and on his arrival found that plaintiffs, without authority, had signed his name to a contract for sale of said premises to Isabel Bond, and finding his affairs so meddlesomely complicated by the action of plaintiffs, he had to have recourse to legal counsel, and was put to great expense in getting advice, and the loss of time in extricating himself, to his damage \$40.

The plaintiffs moved to strike out the third defense of the answer of defendant, for the reasons that the same was not set up in the court below, and was different and new matter of defense, which motion was sustained and the third defense was stricken out.

There was a trial to a jury with a verdict for the plaintiffs of \$452.89.

The defendant's motion for a new trial was overruled, and having taken exceptions on the record the case is brought by the plaintiff in error to review the judgment of the court below on the following assignments of error:

1. The court erred in excluding the evidence of the pendency of negotiation by defendant to enter into another

business that required him to determine on that day of the transaction in controversy.

2. In giving the eighth instruction on its own motion.
3. In giving the seventh instruction on its own motion.
4. In refusing the instructions requested by defendant, Nos. 1, 2, 3, 4, 5, 6, 7, 8, and 9.
5. In overruling the motion for a new trial.
6. The verdict is contrary to the evidence and the instructions of the court.

There were two principal questions submitted to the jury: First, whether the instructions of the plaintiff in error to Sherwin and company constituted an authority to make the sale in controversy to the parties to whom the sale was afterwards claimed to have been made, or whether that authority restricted them to a sale to Bond and Colby. There was conflicting evidence upon this point, which it is not deemed necessary to set out at length. It appears from the bill of exceptions that Gibbons had left the sale of the ten acres of land in question in the hands of the Sherwin Co., as real estate agents, under certain verbal instructions not stated in the evidence. On April 1, 1887, he wrote the Sherwins instructing them to keep the land on the market at the price of \$15,000 and on the following terms of payment: Cash \$2,250, in thirty days \$1,000, in sixty days \$1,500, in ninety days \$1,500, in four months \$2,000, and the balance, \$6,700, to be secured by mortgage on the property, due January 5, 1889, at eight per cent interest, the mortgagee to receipt for payments in sums not less than \$500, at any time when tendered before due, and to release on such lots as are selected by the mortgagor in proportion to the amount of mortgage. Subsequently, and prior to the 4th of April following, the Sherwins received an offer of purchase for the land from Mrs. Isabel Bond, of \$15,000, on payments in a manner somewhat different from the terms of Gibbons; precisely what that difference was does not fully appear,

but it does appear that the cash payment was to have been less, and consequently the time payments correspondingly more than that of Gibbons. This offer was accepted by the Sherwins conditional of its being approved by Gibbons; and on the 4th of April they telegraphed Gibbons that the property was sold, and for him to come up to-morrow. On the next day, April 5, Gibbons was at the office of Sherwin & Co., and learned from them the acts stated. What these facts were, and what Sherwin & Co. then informed Gibbons, as to the party, or parties who had made the proposition to purchase, which had been conditionally accepted, are involved in a considerable degree of uncertainty.

It appears from the cross-examination of Mrs. Bond (as a witness on the part of defendants in error), that she was the active party in negotiating this purchase; that at that time she and Mrs. L. W. Colby were doing some business together, and that it was her understanding—to use her language—“that she supposed, at that time, that Mrs. Colby was going in with her.” There was the sum of \$100 earnest money paid down to Sherwin & Co. on this conditional purchase. The money, Mrs. Bond states, was all her own, though it was paid as that of Bond and Colby, because “she supposed Mrs. Colby was going in with her.”

It further appears from Mrs. Bond's evidence that Mrs. Colby was to have sent her \$100, to go into this business immediately, the next morning after her payment of that amount, and (to use her words) “that did not come, that left her out, and they made a new deal after that.” It also appears from her evidence that after Mrs. Colby was left out Mrs. L. C. McLennan joined Mrs. Bond in the purchase, but finally, and before its consummation, she, in turn, drew out.

To return to the interview between Gibbons and the Sherwins on April 5: It appears that Gibbons came to

their office early in the day and was informed of the particulars of the pending proposition to purchase the land, which had been accepted, subject to his approval. It does not appear to any certainty whether he was informed that the conditional purchase had been made by Mrs. Bond alone, or in connection with Mrs. Colby, so far as the evidence on the part of plaintiffs below shows. Indeed it is left in entire doubt, so far as their evidence goes, whether the plaintiffs below informed their principal at all of the names or personnel of the purchaser. Gibbons, however, did not accept or approve of the terms of the conditional sale, but according to the evidence of defendants in error he made and gave them a counter proposition, which one of the agents set down in pencil on the face of the letter of April 1, as follows: "Cash \$500, in fifteen days \$1,000, in thirty days \$1,750, leaving the terms as to the balance of the payments, the mortgage, etc., unchanged." Upon these new terms being given, Mr. Frank Sherwin, as he states in his evidence, spoke up and said that "he would take these terms and go to their party, and see if he could make the sale on them." In answer to the question, whether he then stated who that party was, he said, "I think I did; I think I mentioned Mrs. Bond; I believe so," and stated that he went and saw Mrs. Bond, and talked with her, and gave her the terms; that she said she thought she could make it, but thought she would have to make some different arrangements, in some way; that witness returned and told Mr. Gibbons and his partners, in their office, what Mrs. Bond had said. It seems that Gibbons was in a hurry to return home, as it approached train time, and as the witness puts it, said, "Well, boys, we will leave it just that way, and I will give you till noon to-morrow to close the sale on my terms that I have made." The witness also testified that Gibbons wished to be notified at once, if they made the sale. In reply to the question, what, if anything, was said during that conversa-

tion about Mrs. Colby being a party to the purchase, the witness answered "there was nothing said."

The testimony of the plaintiff in error, in his own behalf, conflicts sharply with that of the defendants on that point, so that it was a question for the jury whether authority was given to sell generally, or to Mrs. Bond alone, or was restricted to a sale to Bond and Colby. It will be admitted that this question was required to be fairly given and stated to the jury, by the court, in proper instructions. For this purpose the defendant in the court below presented four instructions specially applicable to this point. These were refused, and the court, upon its own motion, gave the fifth instruction of the court's series, which, though not so complete and exhaustive of the question, is comprehensive, and seems to fairly present the subject to the jury, and was given without exceptions, on the trial, by either party. The instruction is possibly open to the objection of counsel, in his argument, that it refers to a possible ratification of the sale by the defendant, of which there was no evidence; but as the instruction was delivered by the court without objection, and without exception being taken, that point will not be further considered here.

The second question presented is, whether there is a sale in fact by Sherwin & Co. such as would entitle agents to charges for commissions thereon from Gibbons, or whether the alleged sale was merely an option to buy, to purchasers. This question must be decided chiefly, if not wholly, by the terms of the receipt given by Sherwin & Co. in the name of Gibbons for the cash payment made by the alleged purchasers as follows:

"\$500.

LINCOLN, NEB., April 6, 1887.

"Received of Mrs. M. Isabel Bond and J. C. McLennan, five hundred dollars, as part of the purchase money on the W. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 18, township 10 north, of range seven east, of the 6th P. M., in Lancaster county, and state of Nebraska. The price of

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said land is \$15,000, of which twenty-two hundred and fifty dollars is to constitute the first payment, which must be paid on or before April 21, 1887, or this five hundred dollars is to be forfeited. Upon the payment of the first payment of \$2,250 I will deliver to the above named parties contracts, on which they are to make the following payments on said lands, viz :

“\$1,000 to be paid May 6, 1887, on or before.

“\$1,500 to be paid June 6, 1887, on or before.

“\$1,500 to be paid July 6, 1887, on or before.

“\$2,000 to be paid August 6, 1887, on or before.

“Upon the payment of which I will deliver a warranty deed to said premises subject to a certain mortgage of \$6,750. All of the above payments are to draw interest at the rate of 8 per cent.

“J. P. GIBBONS,

“By SHERWIN, SHERWIN & Co.,

“*His Agents.*

“Endorsed: Filed October 11, 1887. C. M. Parker, county judge.”

It will be observed that this paper has no provision of an option to purchase. It is an acknowledgment of \$500 received as a part of the purchase money. Its terms throughout are those of purchase and sale, subject to a specified forfeiture in case of default of the first payment by the purchasers.

I do not think that it can be doubted, conceding the authority of Sherwin, Sherwin & Co. to bind Gibbons by the contract of sale of the land to Bond and McLennan, had they complied with the terms by paying or tendering the first payment less the sum of \$500, receipted, that they could have enforced the making and delivery to them of the contracts specified, against him.

The construction of this paper, as to its terms and effect, was a question of law for the court, and not a question for the jury uninstructed. But the court was not requested to

instruct the jury as to its legal effect, but, on the contrary, was requested to instruct them that if they should find from the evidence that the contract attempted to be made by the plaintiffs for the defendant was a mere option to take the premises at the price stated, but that the purchasers were not bound to pay the price, but had the right to drop the contract by their forfeiture of the advance payment, then the jury should find for the defendant. This proposition was refused, and an instruction given that a sale such as would entitle the plaintiffs to a verdict must not be a conditional or optional one, and if the jury should find from the evidence that the alleged sale made by the plaintiffs was an option to take the premises at the price therein named, but that the purchasers were not bound to pay the price, but had the right, under the terms of the sale, to drop the contract on forfeiture of the advanced payment, they were then instructed that such a sale would not render the defendant liable.

This instruction was not objected to, nor exception taken by the defendant, and it is admitted in the brief of counsel that it is substantially the same as that requested to be given on the subject.

It is true that Mrs. Bond, in her testimony upon cross-examination, gave as her understanding of the terms of the contract, that she might by forfeiting the \$500 paid abandon the contract and go no further with it, but it need scarcely be said that even in an action directly upon this contract she would not have been able to vary its terms by her own understanding and statement of its meaning, much less in the present collateral proceedings.

There was an additional question raised on the trial in the court below, and insisted on in the brief of counsel, that even if the Sherwins had authority to sell the land to the parties to whom they claim to have sold it, it was one of the terms and conditions of their authority that Gibbons should have notice of the sale by noon of the next day.

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Counsel says, and truly, "that there is a conflict of evidence on this matter," and a proper instruction that if the jury found from the evidence (contrary to the testimony of the defendant) that the limitation was only that notice should be given, then the sending of notice (within the time limited) would be sufficient.

But counsel contend that the defendant, who proposed the terms, could fix all the elements of the proposal; that if he saw fit to make the acceptance depend upon the actual receipt of the notice, he could do so.

While I am inclined to the opinion that had the proof shown that the defendant had based his refusal to carry out the contract upon the fact that notice of the sale did not actually reach him until past noon of the 6th of April, he would have been entitled to the instruction as presented by his counsel, and that that part of the instruction, as given by the court and excepted to by counsel, would be held to be erroneous, it does not appear that he based his refusal upon that point.

Under date, from the record in this case, "Valparaiso, Neb., 5-5," probably intended for the date of April 6, Gibbons wrote to the Sherwins: "Your reply not coming by noon to-day, I supposed the matter was dropped. * * I am now going to Wahoo, * * and cannot give a definite reply, as to whether I will accept or not, until I get back to-morrow * * and see you later." On the same day he telegraphed, "Don't sell property on any terms until further notice." As to the fact of notice, whether Gibbons' instructions to the agents were that they must sell the land, if at all, so that notice should reach him by noon of the 6th of April, or whether their authority to sell, on the terms given, must be exercised before 12 M. of that day, and that they should notify him immediately upon the consummation of the sale, there is a sharp and direct conflict of evidence, but it may be said that the weight is with the latter. The correspondence of the defendant,

cited as of the 6th of April, does not imply that the time set for notice was the essence of the contract, or that the hour appointed was material to him. While the general proposition that a vendor, proposing the terms of sale of land, may choose his own terms will not be disputed, yet when such party has employed the services of agents to assist in making such sale, and the agent has contributed time, labor, and skill in conformity with instructions, and in the act of successful negotiation the vendor sets a limit of time within which the sale must be terminated, or the agency withdrawn, and adds the further condition that the sale shall be closed and notice sent him at a distant post within a limited time, and the agent proceeds in good faith, and without laches on his part, to consummate the sale, and close it, so that information might be conveyed to the principal on the time limited, and promptly sends information of the fact by the usual channel, before the expiration of the time limited, and by any casualty or failure of the public mails, or telegraph, such information is miscarried and not received by the principal, I do not consider that the miscarriage of the notice could deprive the agent of his right to recover for services actually performed on a *quantum meruit*.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JOSEPH E. COBBEY ET AL., APPELLANTS, V. INDIANA
KNAPP ET AL., APPELLEES.

[FILED DECEMBER 4, 1889.]

1. **Money Judgment: INTEREST NOT REQUIRED.** The plaintiffs having, in accordance with the original decree of the district court in this cause, paid in to the district court the sum of \$385, *held*, that the payment of said money within the time required by the said decree released them from all legal obligation, had any existed, to pay interest upon said sum other than up to the time contemplated by the terms of said decree, and which interest constituted a part of said sum required to be paid.
2. ———: **INTEREST REFUNDED.** The defendant G. O. R. having paid certain sums of money as interest on certain school land, which accrued to the benefit of the plaintiff, *held*, that he is entitled to be repaid the same with legal interest thereon from the date of such payments respectively to the date of such repayment.

APPEAL from the district court for Gage county.
Heard below before APPELGET, J.

J. E. Cobbey, for appellants.

L. M. Pemberton, for appellees Indiana and C. C. Knapp.

E. O. Kretsinger, for appellee Richardson.

COBB, J.

For the facts and history of this case reference is made to the original opinion published in the 23d vol., Nebraska Reports, p. 579. It will there be found that upon the original trial the district court found all of the issues for the plaintiffs; but nevertheless ordered them to pay into court, as a condition of obtaining relief, the sum of \$385, an amount previously tendered by them to some of the defendants, and so alleged in their petition.

The case was brought to this court on appeal by the defendant Richardson. On the first trial he offered to prove that since the assignment of a certain contract, involved in the suit, to him he had paid into the county treasury of Gage county \$64.80 for the use of the school fund of the state of Nebraska, as interest money on the school land contract involved in the controversy.

In the opinion of this court, referred to, it was held that the defendant Richardson, by virtue of the assignment to him of the contract therein referred to, was subrogated to the rights of the defendant Knapp in the said moneys tendered to him, and which had been ordered to be paid into court by the plaintiffs, in the decree of the district court, and was also entitled to the repayment of such sums of money as he had expended in good faith for the purpose of protecting the security, and which had inured to the benefit of the plaintiffs; and that with such exception the decree of the district court was correct; but to that extent it must be modified. The final paragraph is as follows:

"The decree of the district court is reversed, and the cause remanded to that court with instructions to render a decree requiring plaintiffs to pay, not only \$385, but the amount of money actually expended by defendant in the payments referred to, if any such payments were made, with the legal interest thereon, and that upon such payment the prayer of the petition be granted and a decree rendered accordingly."

Upon the cause returning to the district court the defendant Richardson was permitted to file an amended answer, as is presumed for the purpose of enabling him to prove the payments of interest on the school contract, evidence of which was probably rejected at the first trial on the ground that such payments were made after the commencement of the suit. But the amended answer as filed was by no means confined to that subject.

On the second trial the defendant Richardson proved

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that on March 26, 1886, he had paid to the treasurer of Gage county, as interest on the school land contract, the sum of \$32.40, probably the interest for the year 1885, and on December 31, 1886, had paid to said treasurer for interest due to the state, on the contract for the year 1886, \$32.40..

The plaintiffs, on said trial, by the clerk of the district court, and by the records of the court, proved that on August 15, 1887, under the decree of that court, in this action, they had paid into court, for the use of I. Knapp, one of the defendants, the sum of \$385. There was other evidence introduced by either party, not deemed important to consider here. The controversy on said trial, in addition to the payment of the interest on the school land contract by the defendant Richardson, seems to have been devoted chiefly to the question, whether the plaintiffs should be required to pay interest on this sum of \$385 by them paid into court pursuant to the decree. This decree purports to have been made and entered on June 16, 1887. The money was paid into court on the 15th day of August following. This is deemed a reasonable time within which to perform the conditions of a decree of court for the performance of an act, where the time is not specifically limited. The language of the decree is to pay into court the sum of \$350 with interest at ten per cent per annum from the twelfth day of March, 1885, to the twelfth day of March, 1886. This would amount to the sum actually paid in, and the language precludes the construction that interest after March 12, 1886, should be calculated on that sum; and I think it clear that the plaintiffs upon paying the full sum required by the decree were absolutely relieved of any supposed obligation growing out of the tender of the original sum, or of their obligation to pay it.

On the trial of the second action the district court made certain findings, and entered a decree by which the plaintiffs were required to pay to the defendant Richardson, within thirty days, the sum of \$518.76, or in default thereof

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that the lands, in the petition described, be sold as upon execution to pay said sum, and that the plaintiffs have judgment and decree as prayed in their petition, subject however to the claim of defendant Richardson for \$518.76. This decree we think to be erroneous, in respect to the amount to be paid to Richardson. It utterly ignores the payment by the plaintiffs of the sum of \$385 into the district court pursuant to the original decree, which sum, as I understand it, though paid in for the benefit of Knapp, passed to the credit of Richardson by virtue of Knapp's assignment, and is his property, to be paid to him on demand.

So much of said findings as relates to the two payments of \$32.40 each is correct. The decree of the district court is therefore reversed, and a decree will be entered in this court giving the plaintiffs the relief demanded by the original petition, on condition that they pay or tender to the defendant Richardson, or his attorney of record, within sixty days from the entering of such decree, the sum of \$64.80 with interest on one-half from March 22, 1886, to date of payment, at seven per cent per annum, and on a like sum from January 1, 1887, at the same rate of interest.

The costs in the court below will be apportioned between the parties according to the rule of the decree of that court.

JUDGMENT ACCORDINGLY.

THE other judges concur.

AUGUST SANDERS V. GEORGE F. QUICK ET AL.

[FILED DECEMBER 4, 1889.]

1. **Witnesses: CREDIBILITY: QUESTION OF FACT.** In an action by A, B & C against D to recover for money had and received by the defendant "to and for the use of the plaintiffs," etc., the answer of the defendant in effect alleged payment. *Held*, There being a direct conflict in the evidence that the question of the credibility of the witnesses was for the jury, and the preponderance of evidence against the verdict not being so great as to show that it was clearly wrong, the verdict would not be set aside.
2. **Supreme Court: SUBMISSION WITHOUT BRIEFS.** Where a cause is submitted without briefs pointing out objections to instructions given or refused, such instructions will not be examined.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

D. G. Courtney, and *J. E. Philpott*, for plaintiff in error.

J. P. Maule, and *C. M. Parker*, *contra*.

No briefs filed.

MAXWELL, J.

This action was brought by the defendants in error against the plaintiff in error and John Sheedy to recover the sum of \$2,105 "for so much money received from Bertha Quick on the 1st day of June, A. D. 1887, to and for the use of these plaintiffs." An attachment was duly issued against the property of Sanders upon the ground that he was a non-resident. A motion was afterwards made to dissolve the attachment, which was overruled. No particular point seems to be made on the attachment.

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Sheedy filed an answer to the petition denying all the facts stated therein. Sanders also filed an answer, and after denying all the facts, alleges that on or about the 4th day of June, 1887, the said plaintiffs claimed to have an interest and estate in and to the estate of one Tunis P. Quick, deceased, late of the said county of Lancaster; that one Bertha Elizabeth Quick then was the widow of the said Tunis P. Quick, and also the executrix of all his estate, real and personal; that this defendant then was the attorney in fact of the said Bertha Elizabeth Quick; that on or about the said 4th day of June, 1887, the said plaintiffs, by the name of George T. Quick, Jennie Quick, and Jennie Wilson, as parties on his and her own behalf, and the said Bertha Elizabeth Quick, by the name of Mrs. Tunis P. Quick, through and by this defendant as her true and lawful attorney in fact, duly entered into an agreement in writing by and between said parties wherein for and in consideration of the sum of \$14,000 to be paid to said plaintiffs by said Bertha Elizabeth Quick, the said plaintiffs did then and there agree to and with the said Bertha Elizabeth Quick to release the said estate of the said Tunis P. Quick of all claims and demands of every kind and description which they or either of them may have against said estate on any and every account, either of inheritance or otherwise; that at the time of the commencement of this suit the said contract then was and now is in full force and effect, and that on or about the 20th day of June, 1887, the said plaintiffs received thereon the sum of \$11,000, and at divers other times have received large sums of money thereon and now do hold and retain the same and have converted the said moneys to their own use and benefit; that the said moneys, to-wit, \$2,000 and the interest thereon set forth in plaintiffs' said petition, arise out of and are so claimed by the plaintiffs as a part of the said consideration of \$14,000 so to be paid as aforesaid; that this defendant has not had at any time any busi-

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ness transactions with the said plaintiffs or either of them, except as the said attorney in fact of the said Bertha Elizabeth Quick, and has not received at any time any money whatsoever from said Bertha Elizabeth Quick only as her said attorney in fact, and avers the fact to be that the said Bertha Elizabeth Quick has not at any time whatsoever given him any money whatsoever in his individual capacity or on his individual account to and for the use of the said plaintiffs or either of them. Defendant avers that all moneys which have come into his hands as the said attorney in fact he has used, expended, and paid out according to the true intent and manner by the power so vested in him as said attorney in fact. Defendant further avers that if the said plaintiffs have not received in full the said \$14,000 so to be paid as aforesaid the plaintiffs have a full and adequate relief at law on the said written agreement; that the said Bertha E. Quick is solvent, etc.

The facts stated in the answer are denied in the reply. No briefs were filed by either party in the case, and the objections to the instructions, if any, are not pointed out and therefore cannot be considered. The testimony of Mr. Sanders himself tends to show that he received the money in question to be paid to the defendants in error, and he claims to have so paid it to George Quick in Peoria, Illinois. His testimony on that point being: "This \$2,000 you gave him (George) was the twenty hundred dollar bills Sheedy gave you? Ans. Yes, sir." No receipt for the same was offered in evidence except as hereinafter stated. The testimony tends to show that on the 4th of June, 1887, Bertha E. Quick, of Lincoln, constituted the plaintiff in error, her "attorney for me and in my place and stead to agree with, compromise, adjust, and settle with George T. Quick and his wife and mother for any claim they or either of them have against the estate of Tunis P. Quick, my deceased husband, and against me and the devisees in the will of said Tunis P. Quick, deceased

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for the sum of \$14,000 to be paid to the said George T. Quick," etc. On the same date we find a contract in the record, as follows: "In consideration of the sum of \$14,000, of which amount the sum of \$3,000 is this day in hand paid, the receipt whereof is hereby acknowledged, the said George T. Quick and Jennie Quick, his wife, and Jennie Wilson aforesaid, hereby agree to release the estate of the said Tunis P. Quick, late of Lincoln, aforesaid deceased, of all claims and demands of every kind and description which they or either of them may have against said estate on any and every account whatsoever, either of inheritance or otherwise."

A deed signed and acknowledged by the defendants in error, dated June 20, 1887, releasing to Bertha E. Quick their interest in certain lots in the city of Lincoln, was introduced in evidence. The conclusion of this instrument is as follows: "And this conveyance includes all right, title, and interest and claim of every description in and to any portion of the estate, both real and personal, of Tunis P. Quick, of Lancaster county, Nebraska, now deceased."

The consideration for the instrument in question is stated to be \$14,000, "the receipt whereof is hereby acknowledged." If the \$2,000 sued for in this case had not been paid it is somewhat remarkable that the defendants in error should have released their claim upon the estate. The plaintiff in error seems to have been selected to effect a compromise with the defendants in error because of his peculiar qualifications in that line, and he seems to have justified the confidence placed in him by his principal, and his testimony is straightforward and carries with it the probability of its truthfulness.

It is directly contradicted however, and the question of the credibility of the witnesses was for the jury to determine. There is no such preponderance against the verdict as would justify us in setting it aside, although we are not

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fully satisfied with the finding. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

BURLINGTON & M. R. CO. v. EMILY T. WHITE.

[FILED DECEMBER 4, 1889.]

28	166
66	306
56	209

1. **Eminent Domain: DAMAGES: WITNESSES.** Where witnesses are shown to be familiar with the value of a particular piece of land across which a railroad has been built, they are competent to testify as to the value of such tract of land immediately before the location of the road and to the value thereof immediately afterwards. (*E. V. B. B. v. Arnold*, 13 Neb., 485; *N. E. N. E. Co. v. Frazier*, 25 Neb., 53-4.)
2. ——— : **ELEMENTS OF DAMAGE.** Where there is a stone quarry upon the right of way which will be destroyed by reason of the grading and road-bed, witnesses familiar with the value of such quarry may be interrogated in regard to the same, as its value is a proper element of damages for the consideration of the jury. So where a dwelling house is situated on the right of way and will become the property of the company condemning the land.
3. **Instructions** set out in the record, *held*, properly given, and those refused were not based on the evidence.
4. **Damages: INTEREST: ERROR WITHOUT PREJUDICE.** Where the amount of the verdict exceeds the award of the commissioners the jury should be instructed to allow interest on the value from the time of condemnation. (*S. & P. R. Co. v. Brown*, 13 Neb., 318.) Where, however, such instruction was withheld by the judge at the request of the attorneys for the railway company upon an agreement that if the verdict exceeded the award the court might add interest thereto, *held*, that as the verdict did exceed the award, therefore the land owner was entitled to interest on the value as found by the jury, and that a judgment for interest on the verdict, although irregular, was error without prejudice.

ERROR to the district court for Saunders county. Tried below before POST, J.

T. B. Wilson, and *Marquett & Dewese*, for plaintiff in error.

Lamb, Ricketts & Wilson, contra.

Most of the cases cited by counsel are referred to in the opinion.

MAXWELL, J.

The defendant in error in the year 1886 was possessed of a quarter section of land a short distance below Ashland, and the plaintiff in error desiring to change the line of its road located the same on the south side of Salt creek over the land in question and caused the necessary right of way to be condemned, the award of damages to Mrs. White being \$975. She then appealed the cause to the district court, where a verdict was returned in her favor for \$2,800. The court thereupon added interest at seven per cent on the amount of the verdict from the date of condemnation and rendered judgment for \$2,689.08. The railway company brings the cause into this court by petition in error.

The first error assigned is in permitting witnesses to testify to the amount of damages sustained by the land owner. That is, the value of the land actually taken and the diminution in value of the residue, and the case of *F., E. & M. V. R. R. v. Whalen*, 11 Neb., 587, is cited to show that a different rule prevails in this state. The rule applied in the case cited was borrowed from another state and was found to be liable to cause great injustice, as no matter how great an error the jury might commit it was impossible to review the verdict upon the facts. The rule therefore was changed to guard, protect, and enforce the rights of both parties. (*Railroad v. Arnold*, 13 Neb., 487;

B. & M. R. Co. v. White.

City of Omaha v. Kramer, 25 Id., 489; *N. E. N. R. R. Co. v. Frazer*, Id., 54.)

Some of the commissioners were called as witnesses by the plaintiff in error and testified substantially that the damages sustained by the defendant in error in their opinion were about \$1,000. They were cross-examined as to the mode of estimating damages and what matters were taken into consideration by them. This was proper in order to place before the jury the basis upon which their estimates were made. The testimony tends to show that there was a stone quarry on the right of way taken, which in consequence of the building of the road could not be worked. It is objected that proof on this point was permitted, as it was not a proper element of damage; also that there was a dwelling house taken which was shown to be worth a certain sum, the witnesses, however, not agreeing on the value. These certainly were proper elements of damage. The quarry was a source of revenue and had a value as a quarry and the dwelling would be taken at what it was found to be worth. (*Forney v. Railroad Company*, 23 Neb., 469.)

The land owner cannot prevent the appropriation of his land when needed for right of way, but the law guards his rights by requiring full compensation to be made for the portion taken. A full inquiry was necessary therefore to enable the jury to arrive at the facts in the case.

In a number of cases the court has held that the question of the amount of damages in a given case was one for the consideration of the jury, and that the verdict would not be set aside unless it was clearly wrong. Suppose certain witnesses called by the land owner should fix the damages in the aggregate at \$15 per acre for the land not taken, while those called by the corporation should place the amount at but five dollars per acre, a jury of the county, presumably familiar with the values therein, would be enabled to give credit to such witnesses as in their opinion

made the most accurate estimate. The cases which have come before this court show that the lower or medium estimates are more frequently accepted than the higher, no doubt because the juries regard them as the more accurate. The evidence fully sustains the verdict and there is no material error in the introduction of evidence.

The court gave the following instructions:

"First—This is an appeal from the award of damages sustained by plaintiff by reason of the location and construction of defendant's railroad over and across the east half of the southwest quarter, and the southwest quarter of the southwest quarter of section 31, in township 13, of range 10, of this county. If you find from the evidence that the plaintiff was, at the date of the location and construction of the defendant's said railroad, the owner of the whole of said quarter section, then you are instructed that plaintiff would be entitled to recover in this action whatever damages you may find from the evidence she sustained upon the whole quarter section, if any, notwithstanding only part thereof was described in the condemnation proceedings.

"Second—You are instructed that in estimating plaintiff's damages you will take into consideration all such injuries to the property as necessarily result from the legal and proper construction of defendant's road in the manner shown by the evidence, and also that resulting from its lawful and proper and perpetual use in the future.

"Third—You will first estimate the value of the strip of land actually taken and occupied by the defendant, and to this sum you will add the damages, if any, which you find from the evidence was sustained by the remainder of the plaintiff's said farm.

"Fourth—If you find from the evidence that upon the strip of land as occupied and taken by the defendant there was at the time it was taken a stone quarry, which, by the construction and maintenance of defendant's road over it, has been rendered less valuable or impracticable to work,

then you will take such facts into consideration in estimating the amount plaintiff should recover for the strip of land actually taken and occupied by defendant.

"Fifth—You are instructed that if you find from the evidence that the house on these premises stands within the right of way of defendant's road, then plaintiff should recover for the value of such right of way, including the value of the house as shown by the evidence."

These instructions conform to the evidence and were properly given.

The plaintiff in error requested the following instructions:

"First—The jury are instructed that in assessing damages due the plaintiff for the right of way taken by the defendant company, they must not allow any damages that were sustained by the lessee of said premises. If you find that said premises were leased by the plaintiff to one Spere, for the purpose of farming, pasturing, and quarrying stone, then the damages done by the appropriation of said right of way to the use and benefits of said premises and quarry during the time said premises were leased must not be allowed in favor of the plaintiff.

"Second—The jury are further instructed that in assessing damages due the plaintiff the jury must not take into consideration future benefits and profits that might arise from the use of the premises, but the damages to be allowed are the actual damages to the property caused by the taking of the right of way at the time the same was taken.

"Third—If the jury find that there was any stone on the right of way taken, after the interest of the lessee has expired and over and above the damages caused to the lessee, then you are instructed that you cannot allow plaintiff damages suffered on account of the stone quarry separate and apart from the land; the stone in the land is a part of the realty; and the only damages you can allow is the difference in the fair market value of that land at the time

the right of way was taken from what the fair market value of the land was just before the taking.

"Fourth—The jury are instructed that the damages you are to consider are such as arise alone from the right of way taken for the line of road south of Salt creek. The other line, to the north, is not involved in this controversy, and you will find the fair market value of the plaintiff's land, as a whole, just before or at the time the right of way south of Salt creek was taken, and then find the fair market value of the same land just after said right of way was taken; then you will deduct the last amount from the first and the difference between these two amounts should be the amount of your verdict."

The third and fourth were refused, to which refusal exceptions were taken, and error is now assigned thereon.

The third instruction asked was properly refused. Both sides had examined witnesses upon the value of the quarry, and such testimony was for the consideration of the jury. The instruction in question would practically have withdrawn such testimony from their consideration and given a decided advantage to the plaintiff in error.

The fourth instruction was properly refused.

The question of the abandoned right of way north of the creek was not involved in the case, and there was no evidence to support the instruction asked, and on the mode of estimating damages the court had previously stated the correct rule.

The attorneys for Mrs. White asked the following instruction: "If you find that the plaintiff's damages exceed the sum of \$975, then you will add to such sum as you may find to be her damages interest thereon from the 30th day of June, 1886, at 7 per cent per annum."

It seems that this instruction was shown to the attorneys for the railway company, who protested against giving the same as it would apprise the jury of the amount of the award of the commissioners, and the judge, in deference to

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their protest, withheld the same, as he claims, upon an agreement that if the verdict exceeded \$975, interest would be added to the amount thereof, and the court, at the time, entered the following order: .

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“Upon the trial of this cause came the plaintiff, and requested the court to instruct the jury that if they found that plaintiff was entitled to more than \$975, then they should add interest to the amount they should find, from June 30, 1886, at 7 per cent, and the defendant thereupon requested the court to withhold said instruction in order that the jury might not be informed of the amount of the award appealed from, and thereupon the instruction so requested by the plaintiff was, at the request of the defendant, withheld from the jury upon the understanding that in event the jury should return a verdict for an amount greater than that awarded in the county court, this court should add interest to said verdict and include the same in the judgment in this cause.”

Each of the attorneys for the railway company filed an affidavit denying any agreement that the court might add interest to the verdict in case it exceeded the amount of the award, but we do not find any denial that they requested the court to withhold the instruction in question. In a number of cases this court has held, that where the verdict exceeded the award the land owner was entitled to interest. (*Sioux City, etc., R. Co. v. Brown*, 13 Neb., 317; *A. & N. R. R. Co. v. Plant*, 24 Id., 130.) In the case last cited it is said: “Suppose the land owner is satisfied with the amount of the award, but the railway company is not, and therefore appeals and keeps the land owner out of the use of

his money for one or two years, and on the trial fails to reduce the amount of the award. Here the land owner has been kept out of the use of his money by no fault of his, and the party who has caused the delay should be liable for the use of the money. This is a just and equitable rule, fair alike to the railway company and the land owner, and was applied in *Berggren v. F., E. & M. V. R. Co.*, recently decided by this court."

In *Sioux City, etc., R. R. Co. v. Brown, supra*, the jury were instructed that in case the value of the lots was found by them to exceed the award appealed from they should allow interest on that value from the time of condemnation. The opinion was written by Chief Justice LAKE, who says: "While there is some little diversity in the ruling of different courts upon the question of the right of an appellant to interest in such cases it now seems to be firmly settled that, under a statute like ours, where, notwithstanding the appeal, the company may occupy the land, while the owner may not take the money deposited under the award, interest should be added to the value of the land from the time the owner became entitled to compensation." See *Pierce on R. R.*, 220, and the cases there cited. "The cases cited by counsel for the plaintiff in error upon this point, particularly *Concord R. R. v. Greely*, 23 N. H., 237, and *Shattuck v. Wilton R. R.*, Id., 269, do not support him in his position. By the statute under which these two cases were decided, in case of appeal from an award of damages for right of way, the railroad company had the option, either to deposit the money awarded for the use of the land owner, or to give security for the costs and damages that might be adjudged on the appeal. And, if a deposit were made, the land owner had the privilege of taking it without prejudice to his appeal. Under these provisions it was held that if a deposit of the amount of the award were made, interest was allowable only on what was finally recovered on the appeal in excess of the de-

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posit; if, however, there was no deposit, but the company elected to give security for the payment of the costs and damages finally adjudged, so that the land owner could not have the use of the money, then interest on the whole amount should be given. In principle those decisions seem rather to uphold the view taken by the court below, inasmuch as by our statute it is provided that the deposit, in case of an appeal, "shall remain in the hands of the probate judge until a final decision be had," so that it is legally impossible for the owner, although deprived of his land, and all benefit of a possible rise in its value during the delay, to have the use of the money until the proceedings under the appeal are terminated."

Mrs. White therefore was entitled to interest on the verdict and the instruction in question should have been given. It was evidently withheld as a supposed favor to the railway company, and while we hope that in no case hereafter it will be repeated, yet we must accept the statement of the judge that the agreement was made as therein set forth. No doubt it was entered into with the best intention and as a means of obtaining a fair verdict, but all proceedings relating to a trial should be transacted publicly in open court. The law has no favorites—equal justice to all being its motto.

Besides Mr. Shedd, a witness called by the plaintiff in error, had testified that he was one of the commissioners who made the award and that the amount of damages sustained by Mrs. White was about \$1,000, and he was corroborated in this by another one of the commissioners. Their estimate and award therefore were in effect before the jury. And in a case of this kind where the award is considerably less than the actual damages sustained the statement of the amount of award instead of being testimony favorable to the land owner is frequently evidence against him and probably would have been so in this case.

As Mrs. White was entitled to interest on the amount of

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condemnation money, of which she has been deprived for a long time there was no error in allowing the same, although the procedure in doing so was irregular. It is apparent that substantially justice has been done and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

MARY E. GANDY v. C. C. DEWEY ET AL.

28	175
40	886

[FILED DECEMBER 4, 1889.]

1. **Liens: LANDLORD: MORTGAGEE OF CROPS: PRIORITY.** A rented of B & C certain land at \$2 per acre on which to sow winter wheat, the rent to be paid in cash. It was provided in the lease that the amount due for rent should be a lien on the crop, but the lease was not recorded. Afterwards the lessee executed a chattel mortgage on the crop to one who had no notice of the conditions of the lease. *Held*, That the lien of the mortgagee was superior to that of the lessor. (*Lanphere v. Lowe*, 3 Neb., 131.)
2. **Chattel Mortgage: ALTERATION: EVIDENCE.** A clear preponderance of the testimony tends to show that the mortgage had not been altered after its execution.

ERROR to the district court for Johnson county. Tried below before APPELGET, J.

E. W. Thomas, and *D. F. Osgood*, for plaintiff in error:

The leases not having been recorded, could not affect the rights of innocent third parties and were besides attempts to charge a thing not *in esse*, as they were made before planting the wheat. (*Lanphere v. Lowe*, 3 Neb., 131; *Boggs v. Thompson*, 13 Id., 403.) Conclusive evidence was necessary to show that the chattel mortgage was modified.

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(*Sloan v. Becker*, 26 N. W. Rep. [Minn.], 730; *Guernsey v. Am. Ins. Co.*, 17 Minn., 104; *Gillespie v. Moore*, 2 Johns. Ch. [N. Y.], 585; *Nevius v. Dunlap*, 33 N. Y., 676; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass., 290; *Miner v. Hess*, 47 Ill., 170.)

A. M. Appelget, for defendants in error C. C. and R. W. Dewey:

One who deals with a tenant relative to the leased premises, is bound to know the nature of the tenancy. (*Uhl v. May*, 5 Neb., 160; *Conlee v. McDowell*, 15 Id., 188; *Weaver v. Coumbe*, 15 Id., 170.) One cannot convey a greater interest than he possesses. (*Yates v. Kinney*, 19 Neb., 287.) The leases in this case reserved a definite interest in the realty and crops, differing from those which merely create a lien on the latter. Hence the rights of the lessee did not accrue until the payment of the rent. (*Metcalfe v. Fosdick*, 23 Ohio St., 114; *Stephenson v. Haines*, 16 Id., 478; *Case v. Hart*, 11 Id., 367; *Dalton v. Landhan*, 27 Mich., 529; *Haynes v. Ledyard*, 23 Id., 319; 44 Id., 621; *Jones, Chattel Mortgages*, [3d Ed.], sec. 11.) It was not necessary that the leases should have been recorded in order to preserve the rights of the Deweys. (*Metcalfe v. Fosdick*, *supra*.) The mortgage is invalid so far as the crop was unplanted at the time of the execution. (*Boggs v. Thompson*, 13 Neb., 403; *Cole v. Kerr*, 19 Id., 557; *Johnson v. Walker*, 23 Id., 741.)

L. C. Chapman, for defendant in error Lawson:

As the evidence shows that not more than seventy of the 100 acres were planted at the time of the execution of the mortgage, the latter is void so far as it affects Lawson. (*Horton v. Williams*, 21 Minn., 187; *Russell v. Winn*, 37 N. Y., 591.) The mortgage was in possession of plaintiff in error's agent, and that fact raises a presumption that the alteration was made by him. (1 Smith's Leading Cases, 816.) Such

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alteration, if material, avoids the instrument. (*Oliver v. Hawley*, 5 Neb., 439; *Savings Bank v. Shaffer*, 9 Id., 1; *Miller v. Alexander*, 13 Tex., 505.)

MAXWELL, J.

About the middle of September, 1886, C. U. Richardson leased of C. C. Dewey and R. W. Dewey 200 acres of cultivated land in sections 27 and 34, town 6, range 10, in Johnson county, agreeing to pay \$2 per acre for the same and the lease should be a lien on the crops raised upon the land. The leases were executed prior to the sowing of the crop (winter wheat) and were never filed for record.

On the — day of October, 1886, Richardson executed the chattel mortgage in suit upon the wheat sown upon the land in question to the plaintiff, Mary E. Gandy, which mortgage was filed for record on the — day of October, 1886. After the execution and delivery of the chattel mortgage to the plaintiff, Richardson left Johnson county. In July, 1887, the plaintiff went to cut the wheat mortgaged to her by said Richardson, and defendants, the Deweys, claimed to have possession by their agent, Joseph Lawson, who went on the land to cut the wheat about the time the agent of plaintiff went to cut the same, and Lawson refused to desist in the further cutting of the wheat, the plaintiff brought this action in replevin. The plaintiff pleads the right of possession under the chattel mortgage above described. The defendants, the Deweys, answered by a general denial. Lawson, who was also made a party defendant, answered, setting up the leases of Richardson and that he had abandoned the same and that the crops therefore reverted to the landlord. L. D. Fletcher & Co. had a mortgage subject to that of plaintiff. On the trial of the cause a verdict was returned in favor of the defendants for the sum of \$390, the value of the property, and \$47.77 damages, and a motion for a new trial having been overruled, judgment was entered upon the verdict.

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The principal contest in this case is between the landlord and mortgagee, the lease not being recorded. This precise question was before this court in *Lanphere v. Lowe*, 3 Neb., 131, and it was held that the right of the mortgagee was superior to that of the landlord. It is said: "It is a very ancient rule of law, that a man cannot grant or charge that which he has not," and in *Jones v. Richardson*, 10 Met. [Mass.], 488, it is said that this "is a maxim of law too plain to need illustration, and which is fully supported by all the authorities." (Bac., Abr., Grants, D, 2; *Codman v. Freeman*, 3 Cush. [Mass.], 309; 2 Kent Com., 703; *Head v. Goodwin*, 37 Me., 187; *Robinson v. MacDonnell*, 5 Maule & Selw. [Eng.], 228; *Chynoweth v. Tenney*, 10 Wis., 400.)

This doctrine is applied to mortgages of goods which may be subsequently acquired by the mortgagee; it is equally applied to sales of personal property, and rights of property. (*Chesley v. Josselyn*, 7 Gray [Mass.], 490; *Rice v. Stone*, 1 Allen [Mass.], 569.) The lease not having been put upon record, it could not affect the rights or liens of third parties without notice. They are protected by the registry acts of our state. (*Sheldon v. Conner*, 48 Me., 584.) There is no evidence showing that the mortgagees of the tenant had any notice whatever of the defendant's claim of lien upon the building. The building is personalty and was in possession of the tenant when the mortgage was executed. At the time the lease was executed the building, as appears by the facts before us, had no existence as the property of the tenant. Therefore, in any aspect of the case, as it is now before this court, I think the mortgagees secured by their mortgage a lien upon the building, and a superior equity to any claim of the defendant against the same.

The Deweys trusted Richardson for the amount of the cash rent. It is true they were to have a lien on the wheat. This was good between the parties, but to charge third

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parties with notice, the lease should have been recorded. The Deweys had no interest in the grain itself, except such as they acquired by the lease, and this not being recorded, a *bona fide* purchaser or mortgagee in good faith would not be charged with notice of the lien. This was so at the time the decision in *Lanphere v. Lowe* was rendered, and since that time the statute has been amended to require conditional sales, etc., to be recorded in order to protect the interest of the vendor or lessor therein. (Comp. St., ch. 32, secs. 26, 27.) The rights of the plaintiff, therefore, were superior to those of the defendants. The provisions of section 1073 of the Code do not seem to apply where the rent is not reserved in kind, and need not be considered.

It is claimed that the chattel mortgage has been changed since its execution, but a clear preponderance of the evidence shows that such is not the case. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

BURLINGTON & M. R. CO. V. SAMUEL WALLACE.

[FILED DECEMBER 17, 1889.]

1. **Railroads: DEFECTIVE APPLIANCES: QUESTION OF FACT.** In an action for damages resulting from personal injury received by reason of the reverse lever of a locomotive becoming detached and changing the motion of the engine, and by which it was sent violently against a car upon which the plaintiff in the action was standing, a question was presented on the trial as to whether the lever became detached by reason of a defective construction of the "reverse lever," "quadrant," and "dog," or by the want of care of the engineer. It was held, upon the evi-

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dence submitted, that the question was a proper one for the jury, there being some evidence of a defect in the operation of the machinery.

2. ———: ———: EVIDENCE. A witness, who was a switchman, was called by the plaintiff in the suit for the purpose of showing a defect in the appliances used for the purpose of reversing the motion of the engine, and stated that to his knowledge the reverse lever of that engine had become detached on two other occasions, and by which the control of the engine was temporarily lost by the engineer. Upon cross-examination he stated that he could not see the lever "fly back," but that upon each occasion he was with the engine, saw its movements by which it refused to change its course, but accelerated its speed at a time when not required, and demanded of the engineer the cause of the failure to follow his directions, when the engineer said, "it flies back." The trial court refused to strike out the evidence of the witness upon motion of defendant. *Held*, No error and no prejudice.
3. ———: ———: WITNESS REFRESHING MEMORY. The refusal by the trial court to let a witness refresh his memory and testify from certain entries in a book, he being unable to testify from memory, was not erroneous, or if erroneous, was not a prejudicial error when the entries from which it was sought to have the witness refresh his memory had already been read to the jury and were before them as evidence.
4. The Instructions upon the question of negligence examined, and *held*, properly given.

ERROR to the district court for Douglas county. Tried below before DOANE, J.

Green & Marple, for plaintiff in error:

The company is not required to warrant the safety of the servant or the perfection of the appliances, but only to use reasonable care to prevent accident. (*Smoot v. R. Co.*, 67 Ala., 13; *Col., etc., R. Co. v. Troesch*, 68 Ill., 545; *R. Co. v. Arnold*, 31 Ind., 174; *Cayzer v. Taylor*, 10 Gray [Mass.], 274; *Gilman v. R. Co.*, 10 Allen [Mass.], 233; *Coombs v. New Bedford Cordage Co.*, 102 Mass., 572; *Gibson v. Pac. R. Co.*, 46 Mo., 163.) It is not liable unless it had knowledge of the defect or was otherwise guilty of negli-

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gence. (*Smith v. R. Co.*, 42 Wis., 520; *Steffen v. R. Co.*, 46 Id., 265; *Morrison v. Construction Co.*, 44 Id., 405; *East St. Louis, etc., Co. v. Hightower*, 92 Ill., 139; *Indianapolis, B. & W. R. Co v. Toy*, 91 Id., 474; *Same v. Flanagan*, 77 Id., 365; *Mad River, etc., Co. v. Barker*, 5 Ohio St., 541; *Warner v. Erie R. Co.*, 39 N. Y., 468.)

Gannon, Breck & Shea, contra:

The engine was defective and any inspection would have revealed the fact; hence the company is liable. (*R. Co. v. Brooks*, 83 Ky., 129; *L., etc., R. Co. v. Cavens*, 9 Bush [Ky.], 559; 4 Am. State Reports, 138; *Tierney v. Minneapolis & St. L. R. Co.*, 33 Minn., 315; *Moynihan v. Hills Co.*, 146 Mass., 586; *Gutridge v. M. P. R. Co.*, 94 Mo., 468; *Fuller v. Jewett*, 80 N. Y., 46, 53; *Murphy v. Boston & A. R. Co.*, 88 Id., 146; *Anderson v. Bennett*, 19 Pac. Rep. [Or.], 769; *Darracott v. Chesapeake & O. R. Co.*, 83 Va., 288.

REESE, CH. J. .

This action was instituted in the district court for the purpose of recovering damages alleged to have been sustained by defendant in error by reason of personal injuries received while in the service of plaintiff in error in the capacity of switchman in its track yard. The injuries were alleged in the petition to have resulted from a defective condition of the engine employed in switching in said yard, at the time, and by reason of such defects the engineer was unable to control the movements of the engine. That by reason of the negligence of plaintiff in error in the use of said engine, the reverse lever, which controls the direction of its movement, was, by reason of the defect referred to, thrown back, thereby changing the motion of the engine and sending it back against a car, upon which defendant in error was standing for the purpose of managing the brakes, with such force as to throw him off the car, causing

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him to fall under the wheels of the engine, and by which, without fault on his part, he was injured. Plaintiff in error by its answer denied that defendant in error was in the exercise of care at the time of the accident, denied negligence on its part, or that the engine was defective, or out of repair, and alleged contributory negligence on the part of defendant in error. A jury trial was had which resulted in a judgment in favor of defendant in error, and for the purpose of a review the case is brought to this court by plaintiff in error—who was defendant in the district court—by proceedings in error.

The motion for a new trial was based on the following grounds :

“First—The verdict is not sustained by sufficient evidence.

“Second—The verdict is contrary to law.

“Third—Errors of law occurring at the trial excepted to by the defendant.

“Fourth—The court erred in refusing to give paragraphs numbers three, four, five, six, ten, and eleven of the instructions asked by the defendant.

“Fifth—The court erred in giving paragraphs one, two, three, four, five, and six of the instructions given by the court.”

Following the course adopted by the plaintiff in error in the brief presented by its counsel, it is contended that there was no evidence submitted to the jury showing that at the time of the accident there was any defect in the engine which contributed to the injury.

It appears from the evidence, and is undisputed, that the crew, of which defendant in error was a member, with the engine in question was switching in the yard of plaintiff in error at Omaha; that it was necessary to remove a coal car from where it stood onto another track, in order that it might be attached to a train, and that said removal was to be made by “kicking” the car to its proper place.

There was evidence tending to prove that defendant in error in the proper discharge of his duties went upon said car and took his place at the brakes for the purpose of controlling its movements; that the engineer in charge of the engine in approaching the car upon which defendant in error stood came to within a short distance from it, when he reversed the motion of the engine, by the use of the reverse lever, in order to cause it to "slow up" as it approached the car; that within a short time after reversing the motion the dog of the reverse lever became loosened from the quadrant by which it was held in place, and the lever flew back, thereby adding greatly to the momentum of the engine and sending it against the car upon which defendant in error was standing. We think there is no doubt but that the accident was caused by the lever flying back, thus taking the engine from under the control of the engineer, and sending it against the car referred to; and the question here presented is, whether there was any such proof of the defect in the quadrant, dog, or lever as to cause the injury and which plaintiff in error might have guarded against by furnishing the engine with appliances which would have prevented the accident. The turning point in this part of the case seems to be upon the inquiry, whether the flying back of the lever should be charged to the carelessness of the engineer in failing to properly adjust the dog in the slot, or notch, as it was termed by some of the witnesses, of the quadrant and thus permitting it to escape from him, or whether the failure of the lever to remain stationary was caused by a defect in some part of the machinery.

It appears that the engine was manufactured by plaintiff in error at its shops, or at least had been "overhauled" in such shops upon several occasions, and that plaintiff would thereby be charged with notice of any defect which actually existed. The evidence of all the witnesses upon this part of the case was to the effect, substantially, that if

the machinery was properly made and adjusted, and the dog was properly placed in the slot by the engineer, it would have been practically impossible for it to escape, in the absence of some other contributing cause, and the lever would have been held firmly in the position in which it was placed by the engineer. But had the machinery been ever so carefully constructed, had the engineer released his hold without seeing that the dog was properly placed in the slot, the natural consequence would be for the lever to fly back. The engineer testified positively and directly that in reversing the engine he placed the lever in its proper position and that the dog entered the upper notch in the quadrant; that he then gave his attention toward the car upon which defendant in error was standing, for the purpose of controlling his engine as it approached that car; that after it had run perhaps the length of a car or less in the direction of the car referred to, the dog became released and the lever flew back, thus placing the engine beyond his control and sending it with force against the car upon which defendant was standing. He also testified that upon two other occasions, prior to the one at which the accident occurred, upon reversing the motion of the engine and setting the lever, as he did at the time of the accident, the lever became released and flew back as it did upon the occasion in question. In the latter statement he was supported by other witnesses.

It was made to appear, quite clearly, that there was no sudden movement, concussion, or jar of the engine which could have thrown the lever, had the appliances for holding it been perfect. There was considerable of evidence submitted to the jury, tending to show that in a great number of engines the reverse lever would at times fly back, as did the one at the time of the accident; but practically all the witnesses agreed that if the appliances were well constructed, and the lever was properly locked by the dog, it could not fly back, unless produced by some jar, concussion, or other sudden movement of the engine.

It was, also, as clearly shown that if, by the fault of the engineer, the dog was not properly placed in the quadrant at the time that he released the lever, it would fly back immediately and would not remain in position so long as it seems to have done in this case, and then become released. Within one or two days after the accident the engine was taken to the shops and to some extent overhauled, and with a view of ascertaining whether the accident was caused by any defects in the reverse lever or its appliances, something of an examination of the lever, dog, and quadrant was made. This examination, however, was only by an inspection of the part. There was no practical test with the engine in motion. In view of all this evidence we think the question was properly left to the jury as to whether the lever became detached by reason of the carelessness or negligence of the engineer, or by some defect in its construction or operation. The jury having found in favor of the latter proposition, we cannot molest the verdict on that ground.

In view of this conclusion we do not think the contention of plaintiff in error, that the accident was caused through the negligence of a fellow servant, becomes a material inquiry in this case, as we must be content with the conclusion of the jury—that the accident occurred through no fault of the engineer.

One William Martin, a switchman, was called by defendant in error, and upon examination he was requested to state whether or not he knew anything about the engine before the day of the accident, and he answered that previous to the accident he remembered of two occasions upon which, after the engineer had reversed the motion, the lever flew back and did not hold in the quadrant. Upon cross-examination it appeared that he did not actually observe the action of the lever, that the engine became unmanageable and from his position (upon the foot board perhaps) called to the engineer to know what the difficulty was and why he did not control his engine; when the engineer in-

formed him that the difficulty was caused by the lever flying back. It was shown that while, in the act of switching, the engineer was under the direction of the switchman so far as the movements of the car were concerned, and at the time in question, while the movement of the engine was noticeable by the switchman, equally as well as by the engineer, and upon the demand for an explanation of the action, the reason was given as stated. The whole matter, with the bare exception of the observance of the lever flying back, was under the immediate observation of both the witness and the engineer. We cannot see that the court erred in permitting the testimony of the witness to stand, even after the cross-examination, in which the facts were brought out as herein stated. Again, no prejudice could result to plaintiff in error by reason of the evidence, for it had been fully stated before by the engineer, and was wholly uncontradicted by any other witness.

Mr. Grensel was called as a witness for plaintiff in error for the purpose, we presume, of proving that of the repairs made upon the engine subsequent to the accident the quadrant and reverse lever formed no part. This was testified to not only by the witness named, but by others who had knowledge of the fact. The witness was interrogated as to what a certain book contained, and testified that it contained a record of engine No. 2 (the one in question), on page 2 of the book; that the entries were made under his direction, and that he knew at the time that they were correct; that the record was kept in the usual and ordinary course of business. Counsel then offered the record in evidence, which upon objection was excluded. As the record offered is not set out in the bill of exceptions, we cannot say that its rejection was erroneous. It was then sought to have the witness refresh his memory by reference to the book and thus testify, but upon further examination on the part of counsel for defendant in error he testified that he did not make the entries sought to be used, was not present when

it was done, and that he compared it with his own book, which was not at hand at the time of trial. The entries in his own book were made by him, but of what others had done. Upon objection the court refused to allow the witness to refresh his memory by testifying from the book as to what repairs were made on the engine in the year 1887. This ruling is now assigned as error.

The question before the jury was as to the condition of the reverse lever and quadrant at the time of the accident. There was no contention as to any other portion of the engine, and hence it is apparent that no inquiry upon the other matters suggested could give any light upon the question then before the court. As we have said, the fact that the quadrant and lever had not been repaired had been fully shown. In addition to this it appears that the witness Tarrance had previously read to the jury as part of his testimony the list of repairs made upon the engine from the entries referred to in this book. The whole matter was already before the jury so far as the repairs made subsequent to the accident were concerned. It was wholly immaterial as to what had been made prior thereto. Admitting the materiality and competency of the offered testimony it is apparent that the court did not err in its rulings excluding it.

Of the instructions given to the jury by the court we here copy those numbered three and four:

"3. If you believe from the evidence that the engine which has been referred to in the testimony as engine No. 2 was at the time of the accident to plaintiff, December 14, 1887, out of repair so that its movements could not be controlled by the engineer, and that the person or persons employed by the defendant to order such engine into the shop for repairs or to direct such repairs to be made, in view of the condition of such engine, or might by the exercise of reasonable care and judgment have ascertained it, and that the injuries resulted to the plaintiff by reason of such want of repair or defective condition of the engine and without

fault or negligence on the part of the plaintiff, then you will be justified in finding for the plaintiff.

"4. If on the other hand you find from the evidence that the plaintiff received his injuries through the carelessness of the engineer, and not from the defective condition of the engine, then the defendant is not liable for the damages resulting from such injury to the plaintiff, but the failure of the engineer to report the defective condition of the engine to the person having charge of the repairs or to such other person as under the rules of the company it was his duty to make reports to, is not such negligence as would relieve the defendant from liability for such injury."

It is insisted that in giving this fourth instruction the court erred. The criticism is that by it the court told the jury, in effect, that it was incumbent upon plaintiff in error to prove that the injuries resulted through the carelessness of the engineer, while in law the burden was upon defendant in error to establish his case by proof. We are unable to see any bias in the instruction complained of. The question of the liability of plaintiff in error or the absence thereof, for defects in the machinery, was fully and fairly presented by the third instruction, and by the fourth the jury were told that if they found that the accident was caused by the carelessness of the engineer and not by the defects claimed to have existed, defendant in error could not recover. This was as favorable to plaintiff in error as the law of the case would justify.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

ELIZABETH GALLIGHER V. JOHN A. SMILEY.

[FILED DECEMBER 17, 1889.]

1. **Homestead.** "The homestead law in force when a contract was entered into is the law applicable to such contract." (*McHugh v. Smiley*, 17 Neb., 620.)
2. ———: **LEGISLATURE CANNOT DIMINISH VESTED RIGHT.** Under the homestead law of 1867, the homestead of a debtor is not liable to a sale upon attachment or execution, so long as it is owned and occupied as a homestead by the debtor. While a judgment will continue to be a lien upon it, which will become operative upon sale, or abandonment, yet it is not within the power of the legislature, by subsequent enactments, to diminish the right conferred by that law and acquired (as against the debts then in existence) by residence and occupation.
3. ———: **WHAT CONSTITUTES.** In its inception, the substance of a homestead is a parcel of land on which the family resides. It is constituted by residence and selection according to law. Where these things exist, the homestead becomes a right in the premises, exempted by law from forced sale.
4. ———: **CASE STATED.** S. was the owner of a homestead of about eighty acres situated near the city of O., upon which he resided with his family and which under the homestead law of 1867 was exempt from sale for the satisfaction of judgments rendered upon indebtedness contracted prior to the repeal of said law. By a subsequent act of the legislature the city of O. was authorized to extend its boundaries, which it did, and which, when so extended, included the land of S., but to which he did not consent. It was *held*, that by bringing the property within the corporate limits of the city the homestead exemption was not diminished.

ERROR to the district court for Douglas county. Tried below before GROFF, J.

Gregory, Day & Day, for plaintiff in error, cited: *De Witt v. Sewing Machine Co.*, 17 Neb., 533; *Turner v. Althaus*, 6 Id., 54; *Horbach v. Miller*, 4 Id., 32; *Bull v. Conroe*, 13 Wis., 233; *Weeks v. Milwaukee*, 10 Wis.,

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242; *Sarahas v. Fenton*, 5 Kan., 593. The holding in *Dorrington v. Myers*, 11 Neb., 388, that the homestead is a vested right, is probably to be interpreted as meaning that the right is alienable only by sale or abandonment. *Barber v. Rorabeck*, 36 Mich., 399, is not well considered, and in both Michigan and Texas the homestead right is recognized in the constitution.

Savage, Morris & Davis, contra, cited: *Dorrington v. Myers*, 11 Neb., 388; *De Witt v. Sewing Machine Co.*, 17 Id., 533; *McHugh v. Smiley*, Id., 620; *Bassett v. Messner*, 30 Tex., 604; *Nolan v. Reed*, 38 Id., 425; *Barber v. Rorabeck*, 36 Mich., 399; *Ham v. Bank*, 62 Cal., 125. *Sarahas v. Fenton*, 5 Kan., 593, is not in point.

REESE, CH. J.

This was a proceeding in aid of execution.

Plaintiff in error filed her petition in the district court in which she alleged in substance that she was the owner of certain judgments which had been rendered by the district court of Douglas county against defendants in error, to-wit: one in favor of the Omaha National Bank for \$1,225.52, rendered at the October term, 1874; one in favor of John McCormick & Co., for \$429.94, and one for \$207.35 in favor of Joseph Sheeley and others, rendered at the March term, 1872; that said judgments had been revived and were in full force as liens against the lands of defendant; that upon the 18th day of July, 1887, execution was issued and levied upon the west half of the south-east quarter of section 3, township 15, range 13 east, in the said county, and which land was claimed as a homestead by defendant, but it was alleged that said premises consisted of more than seventy acres of land after deducting the portion thereof which had from time to time been appropriated by the several railroads crossing over it as right of way; that it was all under improvements, with

dwellings and other houses and buildings located thereon, that it was within the corporate limits of the city of Omaha, and of more than \$200,000 value, and exceeded in quantity by at least fifty acres what defendant had a right to hold as a homestead by virtue of any law at any time enacted under which said homestead could have been acquired.

The prayer of the petition was for an order setting off to defendant his homestead of not to exceed twenty acres in quantity, that the same be admeasured as the law directs, and the remainder declared subject to sale for the satisfaction of the judgments.

Defendant in error answered admitting the rendition of the judgments, but alleging that the lands described in the petition had been owned by him for thirty years and that it had been occupied by him as a dwelling and homestead for himself and family during that time—he being the head of a family; that it did not exceed seventy acres, and until about the 1st day of May, 1887, was not included in any incorporated city, town, or village, when it was included within the corporate limits of the city of Omaha without his consent; that at the time the indebtedness was incurred and the judgment rendered—which was subsequent to the passage of the act approved June 22, 1867, relating to homesteads—the land was exempt from execution by reason of its homestead character. It was also alleged that the question presented had been adjudicated in the district and supreme courts of the state in the case of *McHugh v. Smiley*. The latter allegation was denied by the reply.

A trial was had to the court, which resulted in the following findings:

“This cause having been heard and submitted upon the issue joined and the proofs and arguments of counsel, the court finds the facts of the case to be as follows:

“1. Each of the judgments mentioned in plaintiff’s pe-

tition were duly rendered as herein alleged against the defendant. That said judgments have been revived and are now in full force against the defendant.

"2. That said judgments have been duly assigned of record to the plaintiff.

"3. That executions were duly issued and levied upon the west half of the southeast quarter of section 3, township 15, range 13 east of the 6th P. M., substantially as alleged in plaintiff's petition. That said tract of land embraced at least seventy acres.

"4. That said land has been owned by the defendant about thirty years, and during all of said time the defendant has lived, and now lives, thereon with his family as a dwelling place and homestead; that during all of said time defendant has been (and now is) the head of a family and a resident and citizen of the territory and state of Nebraska.

"5. That until about the first day of May, 1887, said land was not included within the limits of any incorporated town, city, or village. That about the 1st day of May, 1887, the incorporated limits of the city of Omaha were by its city council extended under the act relating to metropolitan cities, approved March 30, 1887, and such extended limits embraced the land of defendant and was so included within the limits of said city at the time of the levy of the execution in the petition mentioned. That said extension was made without the consent of the defendant. That said land is of the value of the sum of two hundred thousand dollars.

"6. That the indebtedness for which said judgments were rendered was contracted subsequent to the passage of the act, approved June 22, 1867, relating to homesteads.

"The court finds, as conclusions of law:

"1. That at the time said indebtedness was contracted, and at the time said judgments were rendered, the said land was exempt from sale on execution on said judgments by reason of the defendant's homestead rights in said land.

"2. That at the time said indebtedness was contracted and said judgments were rendered there was no law by which said land could be brought within the limits of any incorporated town, city, or village, without the consent of the defendant.

"3. That the homestead rights of the defendant, so far as concerns the judgments in question, are to be governed by the law in force at the time the indebtedness was contracted.

"4. That the passage of the act approved March 30, 1887, and the extension of the city limits thereunder, did not affect the homestead exemption of the defendant so far as concerns these judgments, nor subject said land to sale under said judgment executions, so long as the defendant continues in the occupancy of said land as a homestead.

"Wherefore the court doth order that the petition of the plaintiff be dismissed."

A motion for a new trial was filed, alleging in substance that the court erred in its conclusions of law. The motion was overruled. The case is brought to this court by proceedings in error.

The debts were contracted, and the homestead interest of defendant was acquired, under the homestead law of 1867, which was as follows:

"A homestead consisting of any quantity of land not exceeding one hundred and sixty acres, and the dwelling house thereon and its appurtenances, to be selected by the owner thereof, and not included in any incorporated city or village, or, instead thereof, at the option of the owner, a quantity of contiguous land not exceeding two lots, being within an incorporated town, city, or village, and according to the recorded plat of such incorporated town, city, or village, or in lieu of the above a lot or parcel of contiguous land not exceeding twenty acres, being within the limits of an incorporated town, city, or village, the said parcel or lot of land not being laid off into streets, blocks, and lots,

owned and occupied by any resident of the state, being the head of a family, shall not be subject to attachment, levy, or sale upon execution or other process, issuing out of any court in the state, so long as the same shall be owned and occupied by the debtor as such homestead. This section shall be deemed and construed to exempt such homestead, in the manner aforesaid, as well after as before the death of the debtor, and in the event of the death of the debtor, the estate in such homestead shall descend to and be vested in his heirs at law or legatees, free and divested from all claims of any creditors thereto."

It is contended by the plaintiff that the bringing of the land in question within the corporate limits of the city of Omaha operated to diminish the area of the homestead to the limits prescribed by the law—twenty acres.

As appears by the section above quoted (the law in force at the time the indebtedness was incurred), the whole of the tract of land involved was exempt from forced sale on execution or other process. This remained the law of the contract (*Dorrington v. Myers*, 11 Neb., 389), and by the occupation of the property, "he became vested, so to speak, of a homestead estate therein, which was alienable only by sale or abandonment." (*Id.*, 391.)

The homestead right, while perhaps not a new estate lying in grant, or transferable by conveyance under the law, as it existed at the time of its inception, in this case partook of an interest or right in the home, indeterminate in its duration, which might continue during the lives of defendant and his wife, and perhaps the minority of their children. While the right itself could not be bought or sold, yet it was so far vested in defendant as to be beyond the reach of the legislature by a repeal of the law creating it. (*Smyth on Homesteads*, secs. 69 and 70.) In its inception a homestead is a parcel of land on which the family resides, and which is to them a home. It is constituted by the two acts of selection and residence, in compliance

with the terms of the law conferring it. When these things exist *bona fide*, the essential elements of the homestead right exist, of which the persons entitled to it cannot be divested by acts or influences beyond their volition.

At the time this homestead right was acquired, by a compliance with the provisions of the law, the whole of the tract now in dispute was exempt from sale so long as its occupancy continued. While the judgments were liens, for the payment of which (if not allowed to become dormant) the property was pledged, yet the homestead character could not be molested for the purpose of enforcing their payment. By the existence of the homestead right, the power of the judgment creditors to appropriate the property to the payment of their judgments was held in abeyance during the continuance of the right. The right could not be diminished by law without the consent of defendants. (*Mo-Hugh v. Smiley*, 17 Neb., 620; *Same v. Same*, Id., 626; *De Witt v. Sewing Machine Co.*, Id., 533.) For twenty years perhaps, and during the whole time of the existence of the indebtedness, the right could not be questioned. The land was included within the corporate limits of the city by law, and without the consent or procurement of defendant. His rights could not be diminished thereby. (*Bassett v. Mesner*, 30 Tex., 604; *Nolan v. Reed*, 38 Id., 425; *Barber v. Rorabeck*, 26 Mich., 399; *Ham v. Bank*, 62 Cal., 125.)

It is not believed that the fact, that, in some of the states referred to, constitutional provisions direct the legislature to provide suitable homestead laws, can enter into this discussion so as to be of any practical utility. The right must depend upon statutory enactments creating it, and to these enactments the courts must look. The constitutional provisions are directory for the guidance of the legislature.

While it is true that in view of the great value of the property now in dispute, the application of sound moral and business principles, by defendant, would require the

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payment of the debts against it, yet if he prefers to hold the property and allow the judgments to remain and accumulate interest and finally sweep the whole from his heirs or legatees, we know of no legal objection to his pursuing that course.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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WALTER S. TUCKER ET AL. V. EDWARD H. CANNON.

[FILED DECEMBER 17, 1889.]

1. **Malicious Prosecution.** Upon a trial for malicious prosecution the jury found in favor of the plaintiff in the action. The evidence is examined and found sufficient to sustain the verdict, by which the jury found that the criminal prosecution had been instituted maliciously and without probable cause.
2. ———: **PROBABLE CAUSE: INSTRUCTIONS.** An instruction was asked by defendant in the suit and refused by the court, which was as follows: "Probable cause means a state of facts that would lead a man of ordinary prudence and discretion to entertain an honest belief in the guilt of the accused. If you shall find that the defendant, at the time of filing the complaint against plaintiff, believed, and had reasonable ground for their belief, that plaintiff, knowing that defendant Adams was not indebted to him, appropriated to his own use the money he had been charged with embezzling, then you will find for defendants:" *Held*, Properly refused: the first subdivision as having been given in substance in another instruction, and the second because it omitted the elements of fraud.

ERROR to the district court for Douglas county. Tried below before HOPEWELL, J.

J. T. Moriarty, for plaintiffs in error, cited: 1 Parsons, Contracts (6th Ed.), 70; Mechem, Agency, secs. 204, 207;

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Story, Agency, secs. 474-5; *Buckeley v. Keteltas*, 6 N. Y., 348; *Howard v. Day*, 61 Id., 368; *Grant v. Moore*, 29 Cal., 653; *Smith v. R. Co.*, 15 Neb., 583-6; *Clark v. Gell*, 17 Id., 286; *Aultman v. Reams*, 9 Id., 490; *Ross v. Langworthy*, 11 Id., 492; 2 Greenl., Ev., sec. 454; Cooley, Torts, 182; Abbott, Trial Brief, sec. 20.

Breckenridge & Breckenridge, contra.

REESE, CH. J.

This is a proceeding in error to the district court of Douglas county. The action in that court was instituted by defendant in error for damages growing out of an alleged malicious prosecution by plaintiff in error on a charge of embezzlement, instituted in the police court in the city of Omaha. It was alleged in the petition that said prosecution was malicious, without probable cause, and in pursuance of a conspiracy entered into between plaintiffs in error for the purpose of injuring defendant in error, and getting him out of a business in which he was engaged in connection with plaintiff in error Adams, in order that plaintiff in error Tucker might be substituted in his stead; that he was arrested and deprived of his liberty, and upon final trial discharged, and the prosecution ended; that by such prosecution he had been damaged in the sum of \$1,000. The answer was a general denial. A jury trial was had, which resulted in a verdict in favor of defendant in error for the sum of \$72.08. A motion for a new trial was filed, alleging the following grounds therefor:

"First—The verdict is not sustained by sufficient evidence.

"Second—The verdict is contrary to law and the instructions of the court.

"Third—The court erred in refusing to give paragraphs four, six, and eight of instructions asked by defendant."

This motion was overruled, and judgment entered on the

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verdict, and for the purpose of a review the case is brought to this court by plaintiffs in error by proceedings in error, alleging substantially the same assignments of error in the petition as in the motion for a new trial. So far as the first and second assignments are concerned, they may be disposed of by but a brief reference to the evidence, which we have examined with as much care as the time at our disposal would permit. It is conceded, on the part of the plaintiffs in error, that they caused the arrest of defendant in error on the charge of embezzling \$8, alleged to be the property of plaintiff Adams; that Adams drew the complaint and warrant, and that Tucker made oath to the complaint; that on the trial before the police judge the defendant in error was discharged. Defendant in error admits that he collected the eight dollars and did not turn it over to Adams or Tucker, but claims that he had the right to and did apply it on salary claimed by him to be due from Adams.

From the evidence submitted to the trial jury it appears that defendant in error and plaintiff Adams were engaged in business together in the city of Omaha, the contract between them being, in effect, that defendant in error should have charge of the business, managing all of its concerns, collecting and disbursing its moneys, and for his services in that behalf was to receive a salary of \$40 per month, and in addition thereto a percentage of the profits of the business. So far as the eastern correspondence was concerned, the business was conducted in Adams' name, and he maintained an oversight over the books and financial interests of the business. It appears that some little dissatisfaction arose when it was decided by Adams to terminate the contract with defendant in error and substitute, in his stead, his co-plaintiff in error, Tucker. Tucker, to some extent, took charge of the business and conducted it for awhile, in connection with defendant in error, and finally, on the 6th day of July, defendant in error removed

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his effects from the place of business, and substantially left it in charge of Tucker. Plaintiff in error Adams then learned that the eight dollars referred to in the complaint as having been embezzled had been collected by defendant in error, went to the place where the business was being carried on, saw plaintiff in error Tucker, made some inquiry about it, and learned that the money had been collected, and that defendant in error had not paid it over to Tucker, and without seeing defendant in error upon the subject of the said collection, he immediately procured his arrest upon the charge of embezzlement. Without undertaking to discuss the evidence submitted to the jury, it must be sufficient to say that in any view of the case the action of plaintiff in error, causing the arrest, was precipitate and bears the impress of having been for the purpose of enforcing the immediate payment of the eight dollars without reference to whether it had been properly withheld or not.

There was some evidence tending to show that after the arrest of defendant in error, which had occurred at the usual place of business where he had been engaged in connection with plaintiff in error, that he, with the policeman making the arrest, immediately went to the office of plaintiff in error Adams, and demanded an explanation, when he was informed that if he would pay the money which it was alleged he had collected, plaintiff in error Adams would do what he could to relieve him from the prosecution.

For the purpose of reviewing the verdict of the jury and the judgment, it must be conceded that there was at least some evidence submitted that defendant in error believed that Mr. Adams was indebted to him and that he credited the money received upon such indebtedness; that his last month's wages had not been paid and that he had the right to so pay it. The contract entered into between the parties during the preceding March was introduced in

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evidence, but its length would preclude its being copied into this opinion. It is enough to say, however, that it provided for the carrying on of the business, its continuance for two years, and the payment of the salary as above indicated. There was some evidence tending to prove that certain papers were signed at the suggestion of plaintiff in error during the detention of defendant in error, but just what they were does not fully appear, as they were not introduced in evidence. Upon the whole case we are satisfied that the jury was warranted in concluding that the prosecution was more for the purpose of enforcing the payment of the money claimed than the vindication of the criminal law of the state.

Plaintiff in error asked the court to give to the jury the following instruction, which was refused, and to which they excepted:

"Probable cause means a state of facts that would lead a man of ordinary prudence and discretion to entertain an honest belief in the guilt of the accused.

"If you shall find that the defendants, at the time of filing the complaint against the plaintiff, believed and had reasonable ground for their belief, that plaintiff, knowing that defendant Adams was not indebted to him, appropriated to his own use the money he was charged with embezzling, then you will find for defendants."

The first subdivision of this instruction was substantially given by the court on its own motion, in the fifth instruction given, which was, if there be any difference, more favorable for plaintiffs than that asked by them, and was quite sufficient for this part of the case. This was as follows:

"Reasonable or probable cause, within the meaning of the law, may be defined as a reasonable amount of suspicion, supported by circumstances sufficiently strong in themselves, to warrant a cautious man in believing that the accused is guilty. But mere suspicion alone is not sufficient."

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The latter subdivision of the instruction requested was properly refused for the reason that it omitted the intent to defraud, which is of the essence of embezzlement. There was no error in this action of the court.

We find no error in the case calling for reversal of the judgment. It is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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**MARTHA ALLENDORPH, APPELLEE, V. DAVID OGDEN
ET AL., APPELLANTS.**

[FILED DECEMBER 17, 1889.]

1. **Negotiable Instruments: Loss.** M. A., being the owner of two notes secured by mortgage upon land in Nebraska, which notes were past due, and had been endorsed in blank by the executor of her father's will, through which she obtained the notes, sent them by mail to a bank in Illinois for presentation at the place of payment. The notes were received at the bank, and presented for payment, but not paid, and were lost either at the bank or in being returned by mail to M. A. at Lawrence, Kansas. In an action by M. A. upon said notes, and to foreclose said mortgage, as lost instruments, proof of the loss of said instruments, as well as negative proof that they were never sold or disposed of by or under the authority of the bank, being satisfactory and convincing, *held*, that the decree of the district court for the foreclosure of said mortgage and sale of the mortgaged premises for the payment of said notes be affirmed.
2. —: **INTEREST.** At the date of the notes a contract to pay a rate not exceeding 12 per cent interest for the loan or forbearance of money, and the notes sued on calling for twelve per cent interest until paid, the decree providing for the payment of interest at that rate until paid, upheld.

Allendorph v. Ogden.

APPEAL from the district court for Johnson county.
Heard below before BROADY, J.

L. C. Chapman, for appellant Cheney, cited: *Esty v. Snyder*, 41 Ill., 363; *McIlvoy v. Cochran*, 3 Litt. (Ky.), 454; *Cook v. Larkin*, 19 La. Ann., 507; *Pintard v. Tackington*, 10 Johns. (N. Y.), 104*; *Baker v. Dumbolton*, Id., 240*.

R. W. Sabin, for appellee, cited: *Hale v. Christy*, 8 Neb., 268; *Stevenson v. Craig*, 12 Id., 464; *Cheney v. Cooper*, 14 Id., 415; *Herdman v. Marshall*, 17 Id., 259.

COBB, J.

This cause was appealed from the decision of the district court of Johnson county.

On July 21, 1887, the plaintiff filed a petition in the court below stating her cause of action to be:

That on August 14, 1876, the defendant, David Ogden, made and delivered to one Jacob K. Stelle, now deceased, his six promissory notes of that date. One note for \$450 due five years after date, and five interest notes for \$45 each, due in one, two, three, four, and five years after date.

That on the same date defendant Ogden made and delivered to said Stelle a mortgage on S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, and S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, and W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$, 5, 6, 10, in Johnson county, to secure said six notes. Said mortgage provided for an attorney's fee of ten per cent on recovery. Said mortgage was recorded on August 22, 1876, a copy thereof attached to petition as Exhibit A.

Defendant has paid four interest notes due in 1877-8-9, and 1880.

No proceedings at law have been had. On March 7, 1878, J. K. Stelle died. The plaintiff is his daughter and heir at law, and by will of deceased the plaintiff became

the owner of the notes and mortgage sued on, the executor having delivered same to the plaintiff; she has ever since been owner thereof.

That on or about September 1, 1881, after they became due, the note for \$450, and last interest note for \$45, with the mortgage, was lost, and plaintiff has been unable to gain possession of them or find them since, although she has made diligent search at the place where they were last known to be; that the same have never been paid.

That Rebecca Nelson, Rosey Farlow, Gustave H. Straube, and Prentiss D. Cheney claim to have an interest in said land, but such interest is subject to the mortgage now sued on. Plaintiff prays that the mortgage may be foreclosed, land sold, proceeds applied to payment of indebtedness, costs, and attorney's fees.

On November 23, 1887, B. F. Perkins, guardian *ad litem*, filed an answer for Rosey Farlow and — Farlow, denying all allegations that can prejudice minors.

On November 25, 1887, defendant P. D. Cheney filed an answer denying each and every allegation in petition.

On May 21, 1888, defendant G. H. Straube filed an amended answer denying each and every allegation in petition; that the notes described were transferred to one Richardson; that plaintiff is not owner thereof.

On November 26, 1887 the plaintiff filed her reply to the answer of defendant Cheney, denying each and every allegation therein.

On November 15, 1888, the plaintiff filed her reply to the answer of defendant Straube, denying each and every allegation therein.

At the November term, 1888, a trial was had to the court, a jury being waived, and on November 16 the court found for the plaintiff, and further found that the defendant Ogden executed the mortgage as set forth; that said mortgage was duly recorded; that the plaintiff became the owner thereof through the will of her deceased father,

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and is the legal owner thereof; and that there is due the plaintiff thereon the sum of \$925.65; that said mortgage be foreclosed and the premises sold to pay the amount thereof, together with the sum of \$90 attorney's fee, and that \$10 be allowed the guardian *ad litem* of the minor defendants, to which the defendants except and assign for errors:

1. That the court erred in finding for the plaintiff, and that the plaintiff is the owner of the mortgage debt sued on.

2. In sustaining the cause of action that the notes and mortgage sued on are lost, and decreeing a foreclosure of the mortgage.

On the trial in the court below it was proved by the testimony of Moore C. Stelle, of Jerseyville, Illinois, that he and his mother were the executors of the will and estate of his father, Jacob K. Stelle, who died March 7, 1878; that the estate was settled under the will; that his sister, the plaintiff, became the owner of the notes and mortgage in controversy under the will; that she selected the notes and mortgage, and took possession of them as a part of her share, in 1879; that he endorsed the notes, and that she receipted to him for them.

The plaintiff's deposition stated that she was forty-two years of age, that she resided in Lawrence, Kansas, and is the daughter of Jacob K. Stelle, late of Jerseyville, Illinois, deceased; that she is the owner of the claim in controversy in this suit; that she came by the notes and mortgage from her father's estate; that he bequeathed to her \$4,000, by his will, to be paid to her in securities which he owned at his death; that the notes sued on were amongst those she selected and received from the executor of the estate, who sent to her at Lawrence, Kansas, a list of the notes which she selected from to make up her \$4,000; that in May 1879, her brother wrote to her that he would send the notes which she had selected, and shortly afterwards she received from him the notes, and among others the Ogden notes, the

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third and fourth of which, of \$45 each, due August 14, 1879, and 1880, have been paid; the principal note of \$450 and the last interest note of \$45, are unpaid; that she turned them over to her husband, C. W. Allendorph, who managed her business, for keeping, and has not seen them since, and does not, of her own knowledge, know what became of them or of the mortgage security which she also received and delivered to her husband at the same time. These notes were (1) of \$450 and (2) interest note of \$45, signed by Daniel Ogden and payable to J. K. Stelle; that her recollection does not enable her to state the exact date of the notes, or just when they became due, but from data in her possession the notes were dated about August 14, 1876, and bore twelve per cent interest after maturity; that neither of them has ever been paid, and there is still due the principal and interest of both from August 14, 1881, the date she thinks they matured; that the notes and mortgage are lost; that she had her husband mail them for collection to the First National Bank of Jerseyville, Illinois, a short time after they were due, and has not seen them since; that she has had her husband write to the bank for them, but has not been able to trace or find either the notes or mortgage by this means, and refers to letters from the officers of the bank, and from P. D. Cheney, attached to her deposition.

C. W. Allendorph's deposition stated that he resided at Lawrence, Kansas, and was the husband of the plaintiff; that by her direction, ever since their marriage, he has attended to her business affairs; that she was the owner of the claim involved in this suit; that she was such owner by and through the will of her father, Jacob K. Stelle, of Jerseyville, Illinois; that under the terms of said will she selected the notes and mortgage sued upon as a part of her share of his estate, and that they were delivered to her by the executor May 25, 1879; that the third and fourth interest notes, of \$45 each, of David Ogden, due August 14,

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1879, and 1880, respectively, have been paid — and were paid shortly after coming due; that the fifth interest note of \$45, due August 14, 1881, and the principal note of \$450, due at the same date, are still unpaid, and that he does not know where those notes now are, but can tell what he did with them — that both notes and the mortgage were sent by deponent, in a registered letter, August 22, 1881, to the First National Bank at Jerseyville, Illinois, for collection; that deponent has the returned registration receipt for the letter enclosing them; that owing to the absence of Mr. Cheney at the seashore the notes were not collected by the bank; that sometime afterwards the bank undertook to return them to deponent through the mails, and, as near as can now be ascertained, the two notes and mortgage were lost in the mails between Jerseyville, Illinois, and Lawrence, Kansas; that deponent has never seen the notes or mortgage since he mailed them to the bank on August, 22, 1881; that he has endeavored to find said notes and mortgage by letters addressed to the bank, and to P. D. Cheney at Jerseyville, and to the executor of Jacob K. Stelle, to investigate the matter of their loss, but without success. The letters in reply are produced and attached to the deponent's deposition.

Edward Cross's deposition stated that he was born and raised, and has always lived, in Jerseyville, Illinois; that he has been cashier of the First National bank since 1884; that in August, 1881, he was either vice president or assistant cashier; that on August 26, of that year, the bank received from C. W. Allendorph, for collection, two notes signed by David Ogden, dated August 14, 1876, due on August 14, 1881, one for \$450, the other for \$45, drawing interest after maturity, but deponent does not remember at what rate; his recollection is that they were returned about January 1, 1882, or 1883, to Allendorph at Lawrence, Kansas; deponent has no other knowledge or recollection than that stated; that it was a part of his duties to look

after collections during the time the notes were in the bank; that he has examined carefully for these notes, and has not been able to find them in the bank, and has searched diligently for them wherever he thought they could be; that deponent was cashier, and A. W. Cross was president of the bank on October 13, 1885; that they had charge of the collections and of the affairs, making loans and discounts, etc., at the date of August 13, 1885, and that no other person at that date, connected with the bank, had authority to make sales of notes or securities, or to make loans or discounts of the funds or property of the bank than A. W. Cross and deponent, and that deponent was personally present at the bank attending to his duties and its business on said day, and that deponent is not acquainted with, nor has he ever seen or known of a man named A. Richardson, of New York city, who claims to be the present owner of the notes and mortgage in controversy, and that, to his knowledge at that date of the affairs and transactions of the bank, the bank did not, on October 13, 1885, nor at any other time, sell the said notes and mortgage, or either of them, to the said A. Richardson, and that the bank never had any transaction in relation to the same at that time, or at any other time, with A. Richardson; that the deponent only within the last six months heard of the existence of said Richardson, and had read his deposition, in which he claims to have paid to said bank \$560 on the 13th of October, 1885, for the notes and mortgage in controversy, and deponent declares that said deposition is false, and that said bank neither at that, nor any other time, had any authority to sell the said notes and mortgage or either of them, and that the only authority of the bank was to collect the money and remit it to C. W. Allendorph.

A. W. Cross's deposition states that he is president of the First National Bank at Jerseyville, Illinois, and has been since 1876, corroborating substantially the testimony of Edward Cross, the cashier, as to the notes and mortgage

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in controversy; introducing with his deposition a copy of his letter to C. W. Allendorph, Lawrence, Kansas, dated February 12, 1886, acknowledging the receipt of the notes August 26, 1881, for presentation to P. D. Cheney for payment; that they were so presented and were not paid, and were retained for instructions, and that, as he supposed, Allendorph had adjusted them; after a long time they returned them, as they did as to all other stale collections. Deponent stated that in addition to his brother, Edward Cross, there was with him in the bank on the 13th of October, 1885, Thomas J. Nesbitt as bank clerk, who had access to the funds and negotiable paper of the bank, and made collections from business men on account of the bank, under direction of deponent.

The deposition of A. Richardson was introduced in evidence on the part of defendant Cheney, and stated that the deponent did not know the plaintiff, nor any of the defendants, except Prentiss D. Cheney, whom he had known since the year 1867 or '8; that he knows nothing of this suit, except what he has learned from said Cheney; that he, himself, is the owner and holder of two notes given by David Ogden to Jacob K. Stelle, one for \$450 and the other for \$45, both dated August 14, 1876, and both due five years after date, secured by a mortgage on 100 acres of land in Johnson county, Nebraska; that he then produced the same to the notary public to be copied into his deposition; that he purchased the notes and mortgage of the First National Bank of Jerseyville, Illinois, on October 13, 1885, and paid for the same \$560 in cash, and has owned them ever since, and that no other person has any interest in their ownership, and that they do not belong to plaintiff, and were indorsed in blank by the executor of J. K. Stelle, deceased; that he learned from Prentiss D. Cheney that the notes were right and correct in every respect, and was satisfied as to the security from personal knowledge of the land in Johnson county, Nebraska.

This evidence fully establishes the fact, and without contradiction, that the two notes in controversy were set over to the plaintiff as a part of her portion of her deceased father's estate, and that they came into her possession, and became absolutely her property and remained so until after their maturity; that shortly afterwards, through the agency of her husband, the notes were forwarded to the First National Bank of Jerseyville, Illinois; that by the president of the bank they were taken to the office of Prentiss D. Cheney, in Jerseyville, at which office they were made payable, for presentation and payment, but were not paid. Thus far there is no conflict of the testimony, nor doubt as to the facts. The officers of the bank, testifying from their books, and their customary method of business, reach the conclusion that after retaining the notes for some time in their possession without being paid, at the close of the year, and possibly at the close of the second year, they returned them by mail, pursuant to the invariable custom of incorporated banks, to rid themselves of stale and uncollectible paper at stated periods.

It is clearly proven that neither the plaintiff nor her husband sold nor authorized the sale or transfer of the notes to a third party; and it is equally proven that they were not sold or transferred under any authority of the bank or by any officer of it. But upon that point there is a direct conflict of testimony, as has been seen. The trial court doubtless accepted the evidence of the president and cashier of the bank as truthful, and necessarily rejected the deposition of the witness, Richardson, as apocryphal. The preponderance in favor of known witnesses and their consistent evidence over that of an interested and uncorroborated witness would seem to drive all doubt from the mind that should hesitate as to the two contradictory conclusions. It is not my purpose to analyze Richardson's deposition, but I think had it been true that he would not have failed to testify as to the name and place of the party who repre-

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sented the bank in the sale of the notes to him. These notes being in the bank without authority of sale or transfer, and not having been found in the bank after the most thorough search and inquiry, and after the lapse of seven or eight years without having been presented for collection, I think it a legal and reasonable presumption that they are lost, and were probably lost in the mails. It would seem that all of the statements of the deposition of Richardson were disbelieved and rejected by the district court. Consistently with an acknowledged principle of evidence, having rejected as false the statement that he bought the notes on October 13, 1885, of the Jerseyville Bank, the court might also reject the statement that he had the notes in his possession at No. 303 East Sixty-fifth street, New York city.

Upon such being the case, the right of the plaintiff to recover as upon lost instruments is established. The defendant, by his bill of exceptions, submits as a proposition that the evidence discloses that the notes and mortgage are not lost, but were sold to A. Richardson on October 13, 1885, by some one who had possession of them. It cannot be said that this fact is *disclosed* by the evidence, while it is admitted that the witness Richardson swears to it, and also swears that they were sold him by the Jerseyville Bank, which testimony was discredited and is not believed to be entitled to respect.

I have examined the several propositions of law as well as the various authorities cited by the counsel for the appellant, and do not think any of them analogous to the case at bar; or that the case demands a further examination of them.

At the date of the notes a contract to pay twelve per cent interest per annum was legal; and in the case of *Hager v. Blake*, 16 Neb., 12, in 1884, it was held that "the rate of interest agreed upon in a written contract, not in excess of that allowed by statute, continues until payment."

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The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

SAMUEL D. MERCER V. JOHN L. MILES ET AL.

[FILED DECEMBER 17, 1889.]

Assignment: NOVATION NOT PROVED. S. D. M. entered into a contract in writing with L. and B., whereby he agreed to sell and convey certain city lots in an addition to O., and they agreed to pay him therefor the sum of \$1,800, as follows: \$200 on the last payment of a certain house, and the balance at the rate of \$50 per quarter, commencing six months from the date of the contract, with interest at the rate of eight per cent per annum, payable quarterly. Afterwards L. and B. assigned their interest in said contract to M. E. B., S. D. M. ratifying the assignment in writing. Subsequently S. D. M. assigned said contract to J. L. M. and J. T. in writing on the back thereof, as follows: "Omaha, Neb., June 24, 1887. Assigned to J. L. M. and J. T., and payment guaranteed. S. D. M." There being \$291.21 due on said contract, J. S. M. and J. T. brought suit against S. D. M. upon the guaranty. The defense was a novation of said contract, by which J. L. M. and J. T. agreed to look to the assignees of M. E. B. for payment, and to release S. D. M. Upon the evidence, *held*, no proof of a novation.

ERROR to the district court for Douglas county. Tried below before HOPEWELL, J.

Savage, Morris & Davis, for plaintiff in error.

Mahoney, Minahan & Smyth, for defendant in error, cited: Randolph, Commercial Paper, sec. 947; *Crawford v. Millspaugh*, 13 Johns. [N. Y.], 87.

COBB, J.

This cause is brought to this court on error from the county of Douglas.

The plaintiffs in the court below complained that on June 26, 1886, the defendant and Latey and Benson made a written contract whereby the defendant agreed to sell and convey to Latey and Benson lots 12 and 13 in block 10, in Walnut Hill, in said county, as platted and shown on the map of said Walnut Hill, and recorded December 11, 1883, in the clerk's office of said county, in book 50, pp. 308, 309; that said Latey and Benson, by the terms of the contract, agreed to pay to the defendant the sum of \$1,800, as follows: \$200 on the last payment of a certain house, and the balance at the rate of \$50 per quarter, commencing six months from the date of their contract, with interest at eight per cent per annum from date until paid, payable quarterly; that on November 1, 1886, Latey and Benson sold and assigned to Mary E. Benson all their right, title, and interest in said contract, and the defendant, by proper writing and indorsement of the contract, accepted Mary E. Benson as purchaser, in the place of Latey and Benson, the said Mary taking said contract subject to all payments due to the defendant; that afterwards, on June 24, 1887, the defendant assigned the contract, and all moneys and payments due, and to become due thereon, to plaintiffs by indorsement as follows: "Omaha, Neb., June 24, 1887. Assigned to John L. Miles and James Thompson, and payment guaranteed. Samuel D. Mercer."

The defendant on the same day executed to the plaintiffs a separate written instrument assigning said contracts to them, and agreeing as a part of the same transaction to pay them the amount due, and which might become due, upon the contract in case of the failure of Latey and Benson, and Mary E. Benson, to pay the same when they became due.

That by the terms of the contract there was due plaintiffs on June 26, 1887, \$50; on September 26, 1887, \$50 principal, and \$30 interest; on December 26, 1887, \$50 principal, and \$30 interest; and on March 26, 1888, \$50 principal, and \$31.21 interest; making a total sum due and unpaid of \$291.21, which amount is now due plaintiffs, who demanded the same of Latey and Benson and of Mary E. Benson and one John H. Gibson, who claimed to have some interest in the contract, and payment was refused by all of them, of which plaintiffs gave the defendant immediate notice, and he has neglected and refused to pay the same or any part thereof. Plaintiffs pray judgment, etc.

The defendant answered, admitting the execution of the contract with Latey and Benson; the assignment to Mary E. Benson; the assignment to plaintiffs, and the guaranty of payment by defendant as set out; but whether or not payment had been made of the amounts due, he had no knowledge other than plaintiff's petition.

2. The defendant says that at the time of the execution of said contract he was the owner of said real estate, and upon the assignment of the contract to plaintiffs conveyed the legal title thereof to them; that subsequent to the assignment set out in the petition, the plaintiffs knowingly and consenting thereto, permitted Mary E. Benson to assign said contract to other persons, thereby suffering others than the said Mary to become substituted as principal debtors therein, and releasing the said Mary; that various substitutions of the principal debtors were permitted and consented to by plaintiffs, but the order of said substitutions defendant cannot state, but charges that said contract was assigned to one Perrine, to one Parks, to one Henry Homan, and to one John H. Gibson; that all of said assignments were made without the knowledge or consent of defendant, and with the knowledge and consent of plaintiffs. Defendant is informed and believes that said Gibson is now the principal debtor in said contract, and so charges the fact to

be; and says that he is insolvent, and that plaintiffs have at various times extended the time of payment of said sums without the consent of defendant; that by reason of said assignments and substitutions the defendant is released from his liability on said guaranty and has been damaged to the full amount of the sums due on said contract; that plaintiffs have not resorted to any proceedings to foreclose said contract, or to subject said land to the payment of the amounts due thereunder, and therefore prays judgment that the plaintiffs take nothing by their suit, etc.

The plaintiffs in reply denied that any assignment of the contract mentioned was ever made by Mary E. Benson with the knowledge and consent of plaintiffs; and they further denied that they ever accepted any assignee of Mary E. Benson as a principal debtor on said contract, and further denied that they ever consented or agreed to any assignment of said contract to Perrine, Parks, Homan, or Gibson, or any of them, as the principal debtor on said contract; and they further denied that they had at any time extended the time of payment of said contract, and prayed for judgment, etc.

There was a trial to a jury with a verdict for the plaintiffs of \$304.45.

The defendant's motion for a new trial was argued and overruled and judgment entered on the verdict, to which the defendants excepted on the record, and assigned the following errors:

1. The court erred in excluding as evidence the petition of plaintiffs against Mary E. Benson, J. H. Gibson, and Samuel D. Mercer in the district court of said county, marked Exhibit B of the bill of exceptions.
2. In excluding as evidence the contract marked Exhibit A of the bill of exceptions, with assignments thereon.
3. In sustaining the motion of plaintiffs to strike out the evidence of Perrine, Gibson, Homan, and Benson.
4. In instructing the jury to find for plaintiffs.

The defense relied upon is that the plaintiff knowingly and consenting permitted Mary E. Benson to assign the contract to other persons, thereby suffering others than her to become principal debtors, and thereby releasing her.

Whether this allegation and that which follows it in the answer would constitute a defense to the action need not be further considered. It is sufficient to say that no evidence was introduced and none offered tending to prove that the assignment of the contract by Mrs. Benson, or any subsequent assignment, if others were made, was with the consent or knowledge of the plaintiffs or was ratified by them after having been made either expressly or by implication.

It appears indirectly that two payments were indorsed on the contract. The evidence leaves it most probable that these indorsements were made by the plaintiff's collecting clerk, Thompson, but no evidence was offered to show by whom they were made. The inference is sought to be drawn from certain testimony that they were made by Gibson, the last assignee of the contract, and from these premises the conclusion follows that the plaintiff recognized and approved the assignment to him; and consequently that the defendant was released of his contract of guaranty. Neither of these conclusions, to my mind, follow the premises. It is true that some of the parties to whom the contract passed testified that they did not make the payments, but it is to be observed that Mrs. Benson was not called as a witness, and the evidence from which the conclusion is sought that she could not have made the payments is inconclusive and remote; but even had any one of the parties in whose possession the contract is shown to have been, made these payments, I do not think the receipt of them by the plaintiffs' collector would have amounted to a novation of the contract by which the defendant would have been released as guarantor.

Upon the whole issues presented, I think that the in-

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struction of the court to the jury to find for the plaintiff was correct, and that it must be upheld.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

28	216
41	773
28	216
45	617
28	216
46	806
28	216
56	463
55	625
28	216
57	600

FREEMAN C. DODGE V. FREDERICK G. KIENE.

[FILED DECEMBER 17, 1889.]

1. **Contract: PAROL EVIDENCE.** Where a contract has been reduced to writing without any uncertainty as to its terms and meaning, the presumption of law is that the entire contract is contained in the writing, and parol testimony of declarations made by the parties at the time it was made is not admissible in evidence.
2. ———: **EVIDENCE.** The introduction of illegal evidence by one party upon a trial, and its admission by the court, is not sufficient justification for the admission of evidence otherwise inadmissible when offered by the other party.
3. ———: ———. The evidence of the readiness and ability of D. to deliver the hogs, in pursuance of the terms of the contract, examined, and *held*, that the verdict is sustained by the evidence.

ERROR to the district court for Douglas county. Tried below before GROFF, J.

Albert Swartzlander, and Thummel & Platt, for plaintiff in error, cited: Code, secs. 99, 565; *Shelton v. French*, 33 Conn., 489; *Wills v. Willets*, 35 Ill., 88; *Armstrong v. Spears*, 18 Ohio St., 373.

Hall, McCulloch & English, for defendant in error:

The rule excluding parol evidence applies only to the language of the contract; surrounding circumstances are

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proper to be considered in order to understand the intention of the parties. (1 Greenl., Ev., secs. 275-7; *Veryan v. McGregor*, 23 Cal., 339; *Facey v. Otis*, 11 Mich., 216.) The evidence complained of is simply rebuttal of that introduced by plaintiff, and cannot be assigned as error by him. (*Dyer v. Fredericks*, 63 Me., 173; *Ransom v. Bartley*, 70 Mich., 379; 38 N. W. Rep., 287; *Campbell v. Crone*, 10 Neb., 571; *C. & N. R. Co. v. Wiebe*, 25 Id., 543; *Howell v. Graff*, Id., 130.

COBB, J.

This cause is brought to this court on error from the district court of Douglas county.

The plaintiff brought this action in the court below for the failure of defendant to accept and pay for 600 hogs, according to the terms of the following agreement and guaranty:

"SOUTH OMAHA, NEB., April 5th, 1887.

"I hereby agree to deliver to F. G. Kiene, at Wood River, Nebraska, between the 15th of May and the 15th of June, 1887, at buyer's option, six hundred hogs, to weigh from 275 lbs. upwards and to average 300 lbs., at \$5.25 per hundred. Said F. G. Kiene to call for delivery of all or any part of said six hundred hogs, at any time between the dates named.

F. G. KIENE.

"F. C. DODGE.

"In case said F. G. Kiene fails to take said hogs as per said agreement, or in any manner fails to keep said agreement, I hereby agree to pay to said F. C. Dodge the sum of six hundred dollars.

"GEORGE ADAMS & BURKE."

2. The plaintiff duly performed all the conditions of said contract on his part, and was on the 15th day of June, 1887, and for a calendar month prior thereto, ready and willing to deliver the hogs therein mentioned, and on said

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15th day of June, 1887, duly tendered the same to the defendant.

3. That the defendant refused to accept said hogs and to pay for them pursuant to his agreement, to the damage of the plaintiff in the sum of \$2,070, for which he prays judgment, with interest from date.

The defendant on leave answered: That he denied each and every allegation contained therein except as in this answer specifically admitted; denied that he is indebted to plaintiff in any sum whatever upon the pretended contract sued on herein, and further says that at no time between the dates in said pretended contract mentioned, did said plaintiff have a sufficient number of hogs of the kind and weight mentioned to furnish to defendant; wherefore defendant prays to be dismissed with his costs.

There was a trial to a jury with a verdict for the defendants and judgment for defendant's costs, with exceptions on the record, on which the plaintiff assigns the following errors:

1 and 2. In overruling the motion for a new trial, and that the verdict is not sustained by the law or evidence.

3. In refusing to give plaintiff's instructions to the jury.

4. In giving instructions 3 and 4 on the court's own motion.

5. In admitting testimony objected to.

6. In refusing to admit testimony offered.

7. Errors of law excepted to on the trial, and

8. In rendering judgment for defendant on his original answer.

Considering the first and second assignments, they are not believed to constitute reversible errors in this instance, and are therefore overruled.

As to the third and fourth, the plaintiff cannot under the decisions of this court avail himself of the alleged errors, for the reason that no exceptions were saved on the trial, in the first instance, to the refusal to give the instructions

offered, nor were there exceptions taken, in the second instance, to the instructions of the court given on its own motion, and are therefore overruled.

As to the fifth error, the first witness on the trial called by defendant was Frank Chittenden, who testified that he was a salesman at the stockyards at South Omaha, in 1887, employed by George Adams and Burke; that he was present when the parties to this suit were in the office of Adams and Burke at the stockyards in that year. Being shown a certain paper on which this action is brought, he was asked the question, What paper is that? He answered, That is the original of the contract that he wrote; that he made a couple of copies of it afterwards; that he wrote Exhibit A (the guaranty to the contract), referring to it at the request of the defendant.

Q. Did you hear the arrangement, or talk, between Mr. Kiene and Mr. Dodge which led up to the transaction?

A. I heard some talk down in the yard, but did not hear all of it.

Q. What was said by these parties in your presence, and in that of each other, as to the agreement, which led up to your writing it?

A. He was to take 600 hogs, and if he failed to take them, he was to forfeit \$500.

Q. Why, then, was the latter part of that attached, signed "George Adams and Burke;" what did Dodge want Kiene to do?

A. He wanted him to put up \$500, and Kiene, in order not to lay out of the money, had Adams sign this contract, which answered the same purpose.

Q. Did Dodge agree, then, to take Adams and Burke, instead of Kiene, for that \$500? (Objected to, as incompetent.)

Q. I mean for \$600?

By the court: Remodel your question.

Q. (Changed.) Did Dodge agree, then, to take Adams

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and Burke instead of Kiene for that \$600? (Objected to, that the question calls for evidence varying the terms of the written contract between the two parties, and is incompetent.)

By the court: Your question is leading, but I am going to give you just the same deal that I gave the other side on yesterday in this business, if I know how to do it. Try again.

Q. What was said between the parties about the attaching of this latter part of the paper signed by "George Adams and Burke," if anything? (Objected to, as incompetent; overruled.)

A. Dodge wanted Kiene to put up \$500, and they talked it over, and Kiene did not want to lay out of that money and asked him if he would not take Adams for it, to which he said that he would, and that Adams would be good for the money.

There were other questions of the same general character asked and answered over objections, but the foregoing is sufficient to show the general character of the exceptions.

Attention is here called to the instrument sued on, and to the fact that the suit is between Dodge and Kiene alone, and that while the guaranty clause of the contract is set out in the plaintiff's petition, and, together with the instrument, was offered and received in evidence, yet it constitutes no part of the contract between the parties to this action. It would seem, with due deference to the court and counsel who tried the cause below, that any formal inquiry, by evidence or argument, as to this separate agreement of Adams and Burke, was superfluous and premature, in an action in which neither of the guarantors was a party.

The professed object of the defendant in the introduction of the evidence to which exceptions were taken, and of the court in receiving it, was to explain this guaranty clause of the contract, as though a peculiar refraction of borrowed light, from that source, would illuminate the main instru-

ment. If the contract required explanation, and if parol evidence were competent to explain it, then, doubtless, such evidence should have been directed to the terms of the contract itself. The counsel for the defendant, no doubt, gives proper expression to the law in the following paragraph of his brief:

"It is a well settled rule, that when a contract has been reduced to writing without any uncertainty as to the object and extent of the obligation, the presumption is that the entire contract was reduced to writing, and oral testimony as to declarations at the time it was made are inadmissible."

I do not doubt that the guaranty clause, as we have called it, might be read in connection with the main instrument for an explanation of it, if its terms were doubtful, or its meaning obscure, but I do not understand that either party at the trial, or in the argument of the case, claimed them to be so.

The learned court seemed to be in doubt of the admissibility of the evidence objected to on its own merits, and suggested a justification of its admission in the fact that on the previous day he had extended a similar indulgence to the plaintiff. This consideration might weigh with the party himself, to induce him to withhold exceptions, but it cannot be said to change the rules of evidence, in order to balance the errors of that occasion. The admission of this evidence must be held to be error, but for reasons to be given it will not be held to be prejudicial to the plaintiff in error.

But are the terms of the contract in any sense obscure or ambiguous, or is its meaning unintelligible or doubtful? I do not so consider them. Dodge agreed to deliver to Kiene, at Wood River, between the 15th of May and the 15th of June, 1887, at buyer's option, 600 hogs, to weigh from 275 pounds upwards, and to average 300 pounds, at \$5.25 per hundred. Kiene agreed to call for delivery of all or any part of the 600 hogs at any time between the dates named.

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The word "option," in the sense used in the contract, is recognized as a privilege to a party to a time contract of demanding its fulfillment on any day within the specified limits. Here the privilege was that of Kiene, to call for and demand the delivery of the hogs, at the place designated, at any time between the 15th of May and the 15th of June. By the exercise of this privilege, had he chosen it, he could have limited the right of Dodge to deliver the hogs and demand the price, under the contract, to that day. Not having chosen to exercise this right, the rights of Dodge were confined to the last day of the contract. It is argued by the defendant's counsel that the contract lacks the element of mutuality — that it fails to provide in express words, upon the delivery of the hogs, that Kiene was to pay for them; yet, taking the whole provisions of the contract, it would seem that the words following the agreement of Dodge to deliver the hogs "at \$5.25 per hundred," and the agreement of Kiene to "call for delivery," amounts, in substance and beyond implication, to an agreement by Kiene to pay for the hogs, on delivery, at the price specified.

Before, however, Dodge could lawfully demand of Kiene to receive the hogs on the last day of the contract, he must have the hogs, on hand, at the place of delivery, and be in condition to fully discharge his part of the contract, and to do whatever was necessary and reasonable, to notify Kiene of his ability and readiness to deliver them.

It grew out of the option conceded to Kiene, under the terms of the contract, to call for the delivery on any day within the time limited; that the right of Dodge to offer to deliver, without a call by Kiene, was confined to the last day of the time limited. The parties are shown by the bill of exceptions to have been, at the time, extensive dealers in hogs. It is apparent from the testimony that, when they entered into the contract, it was the intention of both parties to carry it out in good faith, so that if, on the last day of the time limited, Dodge had the hogs at the place of delivery,

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and notified Kiene, or did that which might be deemed reasonable, to the extent of his ability, to notify him of his readiness to comply with the contract, he ought to recover; and the measure of his recovery would be the difference between the market value of the hogs at that time and place, and the price specified in the contract, if there was such difference; and it appears from the evidence that there was.

The main question, then, for the jury, and which, as no exceptions were taken to the instructions given or refused, this court will presume was fully and fairly submitted to them, was, whether on the 14th day of June the plaintiff was ready and prepared to deliver the hogs to the defendant and duly notified him of that purpose.

Upon this main point there is conflicting evidence: the plaintiff himself, and his brother, G. F. Dodge, testified that he had the hogs on hand, and was prepared to deliver them, while Ford and Williams, whose depositions were read on the part of defendant, and who appear to have been familiar with the circumstances, testified that at no time during the period limited, nor on the last day, had the plaintiff the number and quality of hogs on hand at the place of delivery. Whatever may, in point of fact, have led the jury to their conclusion, we, as a court of review, must assume that they had reason to believe the evidence of the witnesses for the defendant, and that they disbelieved that of the plaintiff and his witness. In that view, we cannot say that the verdict is unsupported by the evidence in the case.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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COUNTY OF DODGE V. CHARLES KEMNITZ.

[FILED DECEMBER 17, 1889.]

Bastardy: DEATH OF COMPLAINANT: REVIVOR. L. M., an unmarried woman, having made complaint, under the statute relating to illegitimate children, before a justice of the peace against C. K., who was arrested and brought before said justice; and she having been examined before said justice and her examination taken down in writing, after the birth of her illegitimate child; and said L. M. having died; the action was revived in the district court in the name of the county as plaintiff. Upon the trial the plaintiff offered in evidence the examination of L. M. before the justice, which was rejected. *Held*, Error.

ERROR to the district court for Dodge county. Tried below before MARSHALL, J.

Geo. L. Loomis, and *C. Hollenbeck*, for plaintiff in error:

The testimony of deceased witnesses at a former trial may be proved at a subsequent one. (*Barnett v. People*, 54 Ill., 325; *People v. Diaz*, 6 Cal., 248; *Commonwealth v. Richards*, 18 Pick. [Mass.], 435; *State v. Mc O'Blenis*, 24 Mo., 402; *Hair v. State*, 16 Neb., 602; *Summons v. State*, 5 Ohio St., 325; *Rhine v. Robinson*, 27 Pa. St., 30; *U. S. v. McComb*, 5 McLean [U. S.], 287; 1 Wharton, Crim. Law [7th Ed.], sec. 667.) *Altschuler v. Algaza*, 16 Neb., 631, and *Baxter v. Township*, 16 Ohio, 56, are not in point. The testimony before the justice became primary evidence when the witness died.

Frick & Dolezal, for defendant in error:

Ch. 37, Comp. Stats., is taken from the Ohio statute and is to be interpreted according to the holding in *Hamm v. Wickline*, 26 Ohio St., 81, and *Baxter v. Columbia Township*, 16 Ohio, 57. Under this act, if the woman's testimony is to be used to sustain a verdict she must testify

18	18
38	38
28	224
38	555
28	224
62	427a

twice so that comparison may be made. As the statute makes no exception in this requirement, the courts can make none. (*Bosely v. Mattingly*, 14 B. Mon. [Ky.], 89; *Coffin v. Rich*, 45 Me., 507; *Kilpatrick v. Byrne*, 25 Miss., 571; *Bidwell v. Whitaker*, 1 Mich., 469; *Bradbury v. Wagenhorst*, 54 Pa. St., 180.) The testimony before the justice was not original evidence. (*Altschuler v. Algaza*, 16 Neb., 633.)

COBB, J.

Lena Martin, an unmarried woman, made complaint, under the statute entitled "illegitimate children," before a justice of the peace of Dodge county, against Charles Kemnitz, and upon his arrest and being brought before the justice she was examined under oath respecting the cause of her complaint. The accused was allowed to ask her any questions he thought proper, all of which examination, questions, and answers were reduced to writing by the justice, who upon consideration thereof required the said accused to enter into a recognizance in the sum of \$500 with good and sufficient security, for his appearance at the next succeeding term of the district court in and for said county, to answer said accusation, etc., which was given.

At the next succeeding term of said district court the county of Dodge, by its attorney, appeared, and filed the affidavit of George L. Loomis, county attorney, setting forth, amongst other things, that subsequent to the examination of the said Lena Martin by the said justice of the peace as above set forth, and the entering into recognizance by the said Charles Kemnitz as above stated, the said Lena Martin gave birth to a bastard child, of which she was pregnant at the time of said examination and of which it is charged that the said Charles Kemnitz is the father; that subsequent to the birth of said child and on or about the——day of September, 1888, the plaintiff, Lena Martin, died; that said bastard child was then living at and within the county of

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Dodge and might become a county charge, etc., and upon the said affidavit and the papers returned in said cause by the said justice of the peace, the said county moved to be substituted in the place of the said Lena Martin in said action, and for leave to take up and prosecute the said action. And thereupon the attorney of Dodge county, George L. Loomis, appeared in open court and suggested the death of Lena Martin, the plaintiff in said action, and moved that the action be revived in the name of the county of Dodge as plaintiff, which latter motion was on the 6th day of February, 1889, by the said court allowed and the action revived in the name of the county of Dodge.

The cause was tried to a jury, with a verdict and judgment for the defendant.

The cause is brought to this court on error by the plaintiff, which assigns several errors; but which it is not deemed necessary to set out in detail.

It appears by the bill of exceptions, that upon the trial the plaintiff called Charles Inches as a witness on his behalf, who testified that he resided at Scribner; that he was by profession a doctor of medicine; that he was called upon some time in the then last September to attend one Lena Martin; that he called on her on the 3d day of said month of September; that she was then living about a mile and a half from Snyder, at her father's; that he found her in child-bed. She gave birth to a child in the course of an hour; the child was born alive. The mother, Lena Martin, died, witness believed, on the 23d day of said month.

Mary Martin was called as a witness on the part of the plaintiff, and testified that she resided in Snyder, Dodge county; that she was a sister of Lena Martin; that Lena Martin was an unmarried woman; never had been married; that she died September 19, 1888. She gave birth to a child September 3, 1888.

S. F. Moore was called as a witness by the plaintiff, and testified that he was a justice of the peace; that he knew

nothing of Lena Martin except that she came before him to make a complaint; that her evidence was taken in writing; that witness took it; that a paper that was handed to witness and was made a part of the bill of exceptions is the evidence which witness took down; that the defendant was present with attorneys.

Thereupon plaintiff offered in evidence the testimony of Lena Martin, the plaintiff, then deceased, as given under oath before said witness Moore, as justice of the peace, and taken down, returned, and certified by him as such, as required by law. To which the defendant objected and the objection was sustained by the court and the evidence excluded. And thereupon the court gave the following instruction to the jury: "You are instructed to find a verdict for the defendant, there being no evidence to sustain a verdict for the plaintiff."

Section 2 of chapter 37, Comp. Stats., provides that the county commissioners, in all cases where a woman has a bastard child and neglects to bring a suit for its maintenance, or brings a suit and fails to prosecute to final judgment, and where sufficient security is not offered to save the county from expense, may bring a suit in behalf of the county against him who is accused of begetting such child, or may take up and prosecute a suit begun by the mother of the child. This provision doubtless gave the district court ample authority for its proceeding in reviving the suit in the name of the county as plaintiff. The county authorities as overseers of the poor have in most or all of the states always been recognized as the proper parties to conduct proceedings under the bastardy act, where for any cause the mother fails to prosecute. The statute, however, is silent as to the procedure in such cases. It is therefore of necessity the duty of a court to frame its procedure in each case according to its peculiar necessities, to the end that there shall not be a failure of justice, and assuring to the accused as much consideration

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for his natural and constitutional rights as possible consistent with the interest and safety of the public.

Section 5 of the act provides for a jury trial in all cases where the accused shall plead not guilty to the charge in the court to which he is recognized. There does not appear to have been any plea in this case, the trial, doubtless, proceeded as though there was a plea of not guilty. The section expressly provides that the examination before the justice shall be given in evidence. Now this applies as well to cases brought or prosecuted by county authorities under the provisions of the second section as to those where the prosecution is commenced and carried on by the mother. While it is obvious from the language of the section that one purpose which the legislature had in providing that the examination of the complainant taken down by the justice should be read upon the trial was the protection of the accused against a false accusation made by an untruthful and perjured complainant, who as a rule is vacillating in a repetition of her charge, it was not the only purpose. In the second section the legislature recognized the probability of cases arising where mothers or prospective mothers of illegitimate children, having made complaint under the provisions of the first section, caused the arrest of the father and been examined in respect to the grounds of her complaint, will be induced to abandon such prosecution and fail voluntarily to follow it to the district court and there repeat their statement of the facts upon which it is founded. As we have seen, the law makes it the duty of the county authorities in such case to take up and prosecute such suit. In such case it would doubtless be the duty of such authorities to apply to the court for process to compel such recalcitrant complainant to appear and testify in such case. The examination before the justice would answer the purpose of discrediting her if through perjury her second examination was substantially different from her first, or of adding to the weight of her

testimony if consistent with it. Whether if in such case the county authorities, after exhausting the process of the court, be unable to procure the testimony of such complainant before the court—she being still alive—the examination taken before the justice would be sufficient evidence to sustain a verdict for the plaintiff, I do not decide; but that it would be admissible in evidence I do not doubt, nor deem it necessary to go beyond the fifth section of the act above referred to for authority therefor.

In the case at bar, the complaint having been duly made, the accused arrested and brought before the justice, the complainant examined and her examination taken down by the justice and returned to the district court, and the accused recognized to appear thereat, the complainant was removed by the hand of death. As in any case of the death of a sole party to an action, *pendente lite*, the action abated. Applying the provisions of sec. 458 of the Civil Code to those of section 2 of the act hereinbefore referred to, the court revived the action in the name of the county as plaintiff. The action being so revived, I see no escape from the conclusion that its trial, and every proceeding in it, must be governed, so far as possible, by the same provisions and rules of law as though it had never abated.

Amongst the other provisions governing such trial, I quote from sec. 5: "At the trial of such issue, the examination before the justice shall be given in evidence, and the mother of the bastard child shall be admitted as a competent witness, and her credibility be left to the jury." These provisions apply to the cause of action on the case of the plaintiff; but there is nothing in the language indicating a purpose on the part of its framers to make one part of the clause depend upon the other; in other words, to make the giving in evidence of the examination before the justice depend upon the admitting of the mother of the bastard child as a competent witness. These two instruments of evidence are treated independently of each other, though

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in the same section and clause. In the case at bar one of them was at hand, ready to be presented to the consideration of the jury should it have been withheld from them, because by the act of God the presentation of the other had been rendered impossible.

The said section also contains the following clause: "On the trial of the issue the jury shall, in behalf of the man accused, take into consideration any want of credibility in the mother of the bastard child; also any variations in her testimony before the justice and that before the jury," etc. Counsel for defendant in error argued at the bar and in the brief that under this provision the presence and testimony of the plaintiff mother in person before the jury was an indispensable condition to the giving in evidence of the examination taken before the justice. And it cannot be denied that there is the best of authority for this proposition. The chapter of our statutes above referred to was taken almost literally from the statutes of Ohio in force in 1847; in that year the case of *Baxter v. Columbia Township*, 16 Ohio, 56, was decided by the supreme court of that state. The facts of that case were substantially parallel in all material respects to the case at bar. It was there held that the presence and testimony of the woman upon the trial were indispensable, except in the case of a confession in open court, and that the right given by the statute could not otherwise be secured.

While I accord to the above case all the elements of an authority I do not think that it ought to be followed. If it is good law, then the second section of the act is utterly nugatory, and the favorite maxim of the law, "There is no wrong without a remedy," ought to be expunged.

Proceedings under the act in question are to some extent special proceeding, yet the general rules of evidence must be held to apply to them. Among these rules one of universal application is that which requires the best evidence attainable to be given of any controverted fact. The cor-

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ollary of this rule is, that the best evidence of a material fact on trial is always admissible unless rendered inadmissible by positive statute. Under this rule we held in Hair's case, 16 Neb., 601, that "Where a deceased witness testified upon a former trial of the same party for the same offense, being brought face to face with the accused and cross-examined by him, it is competent, upon a subsequent trial, to prove the testimony of such deceased witness," etc. It was also held that such evidence might be proved by the court reporter; and under the same rule it must be held that the examination of Lena Martin, taken before the justice, she being deceased, was admissible upon the trial in the district court, independent of the provisions of the statute. And yet I desire to put this opinion squarely upon the construction of the statute, upon which I reach the conclusion that the district court erred in rejecting the evidence and in directing a verdict for the defendant.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

WILLETT L. IRISH, APPELLANT, v. GEORGE E. PHEBY
ET AL., APPELLEES.

[FILED DECEMBER 17, 1889.]

1. **Pleadings: JUDGMENT ON.** The plaintiff, in and by his petition, having alleged the necessary facts to entitle him to the judgment and relief therein demanded, and none of such facts and allegations having been denied, nor any set-off, nor counter-claim, nor other fact or matter alleged, or pleaded in avoidance thereof, *held*, that the plaintiff was entitled to a judgment on the pleadings.

28	231
36	822
38	877

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2. The evidence examined, and *held*, that as a matter of evidence the plaintiff was entitled to a judgment.

APPEAL from the district court for Douglas county
Tried below before GROFF, J.

Winfield S. Strawn, for appellant.

Holmes, Wharton & Baird, for Danish Baptist church,
cited: *Morrison v. Paxton*, 17 Neb., 634; *Foster v. Dohle*,
Id., 631.

COBB, J.

- This case was appealed from the district court of Douglas county.

The appellant exhibited a bill in the court below against the firm of Pheby & Turner, builders, of Omaha, and H. A. Reichenbach, Nels Christiansen, A. G. Christensen, A. Busch, and S. P. Sorenson, trustees of the Danish Baptist church, of Omaha, unincorporated, and Isaac Williams, Silas S. Hansen, Dow & McIver, partners, etc., and Caroline C. Van Namee, defendants and appellees, alleging that on February 24, 1888, Pheby & Turner contracted with the trustees and building committee of the Danish Baptist church, of Omaha, to erect for said church and said committee a church building, for religious worship, on lot 3 of block 11 of Parker's addition to the city of Omaha, and to furnish the materials therefor. In pursuance of which they purchased of appellant materials for the construction of the church building amounting to \$295.32, which amount has never been paid, and is now due; that at the time of furnishing the materials, the owner of record of said lot was Caroline C. Van Namee, but that the Danish Baptist Church Society, and the trustees thereof, were the true and actual owners by lease or gift, but the precise nature of the title is not of record; that on May 31, 1888, within sixty

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days after furnishing the materials, the appellant filed an itemized account of the same, under oath, in the office of the register of deeds of said county, claiming a mechanic's lien upon the lot, and the building thereon, for the sum of \$295.32, with interest from April 21, 1888; that Williams and Hansen, and the firm of Dow & McIver, by the records of said county, claim a mechanic's lien on said lot and building, and are therefore made defendants.

The plaintiff below prayed judgment for the sale of the property, upon the adjustment of the liens, and rights of all parties made defendants.

The defendant Van Namee answered, denying all allegations of the bill not expressly admitted; she admits that a church building has been erected on the lot described, and states that she is the owner of said lot; that on April 19, 1887, she leased the same to Taylor Turner for the term of five years from that date; that on April 7, 1888, she gave her consent to Turner to transfer his interest to S. P. Sorenson, which was executed by lease, of which Sorenson holds possession, and that she never authorized the erection of any building thereon.

The defendant Hansen answered, denying all allegations of the bill not expressly admitted; he admits that Pheby & Turner built a church building on the lot described, under a contract with the trustees of the Danish Baptist church, of Omaha; that as to how much material the plaintiff furnished the contractors, if any, he has no knowledge; that he has a lien upon the building for work and labor thereon of twenty-two and one-half days at an agreed rate of wages of \$2.50 per day, employed by the contractors and builders, amounting to \$56.25, due April 28, 1888; that on May 2, 1888, he filed his claim, in accordance with the statute, in the register of deeds' office of said county, perfecting a mechanic's lien on lot No. 4, through error and mistake, and that the building is located on lot No. 3, block 11; that on May 14, following, he

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refiled his claim, according to law, in the register's office, perfecting his said mechanic's lien on lot No. 3 for the said amount due him, and asks judgment therefor.

The defendants Christensen, Busch, and Sorenson answered, jointly, that they were acting as a committee for said church in erecting the building spoken of; that they are informed that the plaintiff claims a lien for lumber and material furnished, but do not know nor admit the amount, nor that he filed it for a mechanic's lien within sixty days, as alleged; that neither of the defendants owns said property; that the church has no lease or right upon the lot, save a verbal license to remain, and pays no rent; that they paid to Pheby & Turner the full sum due upon the contract for the building, and that defendants Williams and Hansen were present at the time of payment, and made no objections—they had been notified to be present and get their pay.

The defendants Dow and McIver answered that they were not informed as to the truth of the allegations of the bill, save that it is true that they have a lien upon the property described, also east fifty feet in Bedford Place, an addition to the city of Omaha, for the sum due them of \$5.70, and pray judgment therefor.

The plaintiff replied to the answer of Hansen admitting that he laid his claim on lot No. 4, and that lot No. 3 is that on which the building was erected, and denies all allegations set up in the answer; to the answer of Dow and McIver he had no knowledge of the matters stated; and to that of Van Namee he denies that she never authorized the erection of the church building on said lot, and admitting that she holds the fee of the premises, reiterates that the church organization, or committee, has an interest therein, under which the building was erected.

Subsequently, the defendants Pheby, Turner, and Williams, having been duly served with process, made default, and upon trial to the court the findings were for the de-

defendants and against the plaintiff; that the plaintiff is not entitled to a mechanic's lien.

II. That Dow and McIver are entitled to a mechanic's lien for \$12.50 for work and material furnished the contractor and used upon the building.

III. That Silas S. Hansen is entitled to a mechanic's lien for the sum of \$56.25.

IV. That the Danish Baptist church is in possession of the land described, under a verbal lease, and is the owner of the church building situate thereon; that the liens of said two defendants attach to, and are liens upon, the interest of said church in said lot and building. The plaintiff's bill was dismissed.

It was further ordered that said mechanic's liens be foreclosed, and that the Danish Baptist church, within thirty days, pay the amounts severally found due, and pay the costs; and in default that its interests in the premises, and the building thereon, be sold as the law directs, and the proceeds applied to the payment of the costs of suit, and of the sale, and the payment of the liens, saving as to the plaintiff's costs adjudged against him. To all of which the plaintiff excepted of record.

The counsel on either side, in their briefs, agree that the chief, if not the sole, ground upon which the trial court found against the plaintiff and denied his right to a lien in the case was, that there was not sufficient evidence of the delivery of the building material, set out and itemized in the bill of particulars, to Pheby & Turner, the contractors, at or upon the site of the building. Upon carefully looking over the pleadings and evidence, I can see no other ground upon which such decision can be based.

Plaintiff, in his petition, squarely alleges the delivery of said materials by the plaintiff at said church building for the purpose of being used in the erection of the same; that they were furnished at the dates set out in said account. These allegations, under the law and rules of pleading,

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were such as to demand an explicit answer from each party defendant who makes a defense. It is denied by the defendant, Caroline C. Van Namee, but not by either of the other defendants. The church trustees in their answer say that they do not admit the amount of the plaintiff's bill, but they do not even say that they do not admit the delivery of the items of building material at the site of the church. But I know of no rule of pleading that attaches any consequence to a defendant's failing to agree to an allegation of the petition; but if he fails to deny a fact well pleaded, and charged against him in such petition, he will, generally, at least, thereby excuse his adversary from the duty of proving it.

The plaintiff, however, introduced evidence of his having sent all of the material from his lumber yard to the ground upon which the church was being erected. This material amounted to eighteen wagon loads, or parts of loads. The plaintiff testified that with each load, or part of load, he sent a ticket, or memorandum receipt, to be signed by the contractors and returned; and he introduced eighteen of these memorandum receipts which are attached to the bill of exceptions. Ten of them are signed by one of the contractors and his signature sworn to be genuine; one of them is signed S. Sorenson, one of the trustees of the church. Seven of them were unsigned, but each unsigned one contains a memorandum that at the time of the delivery there was "no one at the building" and which memoranda were testified to by the plaintiff to have been made by the drivers of the teams carrying such loads respectively. One of these memorandum receipts, which is signed by G. Pheby, one of the contractors, contains a memorandum on its face indicating that the material constituting that load was delivered at the shop of the contractors. In the case of *Foster v. Dohle*, 17 Neb., 631, there was a special finding in the trial court of the amount and quantity of lumber delivered by the plaintiff for the use of the building, and (2)

the quantity of lumber furnished by the plaintiff on the order of the contractor, for use in said building, and actually used therein, including that which was wasted and destroyed in the process of so using. Judgment was rendered for the amount so used, wasted, and destroyed only. In affirming this judgment, the court, in the opinion, construed sec. 1 of chap. 54, Comp. Stats. The language of the section construed is, "Any person who shall perform any labor or furnish any material * * * for the erection, reparation, or removal of any house * * * by virtue of a contract or agreement, expressed or implied, with the owner thereof, or his agents, shall have a lien," etc. In the opinion the court says: "One of the objects of the legislature, no doubt, was to prevent collusion between the owner and contractor and thus protect those who have furnished material or performed labor on the building from being defrauded. And so far as it may be necessary to carry this purpose into effect the law will be liberally construed. But it will not be seriously contended that the mere fact that the owner has entered into a contract with the builder to erect or repair a building authorizes the builder to go to every lumber yard in the city and every hardware store and purchase from each a sufficient quantity of material for the erection or repair of the building in question, and make the owner of the building liable therefor. If all this material was delivered by the material men at the building, and they acted in entire good faith, it is possible the owner might be liable, because the delivery of the material would be notice to him of the unusual quantity which was being furnished for which he might be liable."

The doctrine of the above case, as I understand it, is, that, in a case similar to the one there put, the builder would be liable for such material as was actually put into the building, and might be held liable for material not actually put into the building, if those furnishing it to the contractor acted in entire good faith, and the material was de-

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livered to the material man at the site of the building. In the case at bar there is some evidence of the delivery of each parcel of building material at the site of the building, and sufficient, in my mind, in the absence of any evidence to the contrary. There is not a suggestion in the case that any part of the material that entered into the construction of the church above the foundation was furnished by any party other than the plaintiff, and it appears that the trustees of the church paid off the contractors and the latter absconded before the building was finished, and while one of the cross-petitioners was at work at the carpenter's bench finishing it.

In my view the plaintiff was entitled to a judgment establishing and foreclosing his lien, upon the pleading, and that, had he not been, the evidence in support thereof was sufficient.

No judgment can be rendered in this proceeding against the defendant Caroline C. Van Namee, and the lien hereinafter ordered will extend only to the lease-hold interest in the said lot of the Danish church, and of Soren P. Sorenson.

The judgment and decree of the district court, in so far as the petition, claim, and lien of the plaintiff is in any manner concerned, is reversed and a judgment and decree will be entered in this court in favor of the plaintiff in strict conformity with the prayer of his petition, as above limited, in its application.

JUDGMENT ACCORDINGLY.

THE other judges concur.

PULLMAN PALACE CAR COMPANY V. JESSIE LOWE.

[FILED DECEMBER 17, 1889.]

1. Sleeping Car Companies: LIABLE FOR THEFT OF PASSENGER'S APPAREL. A sleeping car company, so far as it renders service similar in kind to an innkeeper, is subject to the same liabilities; and where an article of wearing apparel belonging to a passenger in one of such cars has been placed in the care of the porter, and is stolen from the car, the company will be liable therefor.

2. The words "Guest" and "Lodger" defined.

ERROR to the district court for Douglas county. Tried below before DOANE, J.

Howard B. Smith, for plaintiff in error:

The Pullman Palace Car Company is not liable either as a common carrier or as an innkeeper. (*Blum v. Southern P. P. C. Co.*, 1 Flippin [U. S.], 500; *Pullman P. C. Co. v. Smith*, 78 Ill., 360; *Woodruff S. & P. C. Co. v. Dichl*, 84 Ind., 474; *Clark v. Burns*, 118 Mass., 275; *Lewis v. N. Y. S. C. Co.*, 143 Id., 267; *Ill. Cent. R. Co. v. Handy*, 63 Miss., 609; *Pullman P. C. Co. v. Pollock*, 69 Tex., 120; *Pullman P. C. Co. v. Gaylord*, 23 Am. L. Reg. [Ky.], 788; *Same v. Gardner*, 16 Am. & Eng. R. R. Cases, 324.) At any rate the company is not liable in the present case, as the overcoat was never delivered to it and it never accepted, but expressly disclaimed, control thereof. (Cases *supra*; *Tower v. Ulica etc., Co.*, 7 Hill [N. Y.], 47; *Blanchard v. Isaacs*, 3 Barb., [N. Y.], 388; *Packard v. Getman*, 6 Cow. [N. Y.], 757; *Welch v. P. P. C. Co.*, 16 Abb. Pr. N. S. [N. Y.], 352; *Steamboat v. Vanderpool*, 16 B. Mon. [Ky.], 302; *Wilcox v. Steamboat*, 9 La. [O. S.], 53; *Hills v. C., R. I. & P. R. Co.*, 72 Ia., 228; *The R. E. Lee*, 2 Abb. [U. S.], 49.) Even conceding for the sake of argument that there was

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such a delivery as imposed *some* responsibility upon the company, it would not have been bound to use more than ordinary care, nor would it have been liable if plaintiff were guilty of contributory negligence. (*Palmeter v. Waggener*, 11 Albany L. J., 147, and cases first cited above.) The loss complained of occurred during the day, and the case is to be distinguished from those above cited where defendant was held liable for losses occurring at night. In those of the above cases where the loss occurred in the daytime, the facts were materially different from those of the present case. There is no evidence that the porter was absent from the car when the coat was stolen. He is last mentioned in the testimony as standing on the platform, and the presumption of law is that he remained there. (Lawson, Presumptive Ev., Rule 30 [G].) To sum up: the obligation of a sleeping car company ends when it has maintained a reasonable watch over its passengers and their luggage, while the former are asleep.

A. Steere, Jr., contra:

A sleeping car company undertakes to serve the public within the scope of its business, exactly as a common carrier or an innkeeper, and hence is under similar obligations. (*Nevin v. Pullman P. C. Co.*, 106 Ill., 222; *Pullman P. C. Co. v. Gardner*, 16 Am. & Eng. R. R. Cases, 324; *Blum v. Southern P. P. Car Co.*, 1 Flippin [U. S.], 500; *Welch v. Pullman P. C. Co.*, 16 Abb. Pr. N. S. [N. Y.], 352; *Thompson v. Lacy*, 3 B. & Ald., 283-7.) The company may impose conditions: *e. g.*, pre-payment (*Pullman P. C. Co. v. Reed*, 75 Ill., 125; Schouler, Bailments, 290); and sobriety on the part of the passenger (*Nevin v. Pullman P. C. Co.*, *supra*); but when these are met, the obligation to serve is complete. As to an innkeeper's liability and the reasons therefor: *Mason v. Thompson*, 9 Pick. [Mass.], 280; *Hulett v. Swift*, 33 N. Y., 572; *Gales v. Hailman*, 11 Pa. St., 515. With the advance of civilization, the sleep-

ing car has largely superseded the old-time inn, and similar rules should be applied to the liability of the owners of each. Public policy and the proper protection of travelers require such rules, and sleeping car passengers should not, in case of loss, be compelled to prove negligence. The company was negligent in not properly guarding against theft, and is liable. (*Woodruff S. & P. C. Co. v. Diehl*, 84 Ind., 484; *Lewis v. N. Y. S. C. Co.*, 143 Mass., 267; *Pullman P. C. Co. v. Gaylord*, 23 Am. L. Reg. [Ky.], 788; *Blum v. Southern P. P. C. Co.*, and *Pullman P. C. Co. v. Gardner*, *supra*.) The fact that the loss occurred in the daytime does not change the liability, especially since it occurred at an eating station. (*Pullman P. C. Co. v. Taylor*, 65 Ind., 169.)

Howard B. Smith, in reply:

The undertakings of the sleeping car company are not those of an innkeeper but of a lodging-house keeper. (2 Kent, Com., 596.) The latter is not responsible for the safety of his lodger's goods. (*Cromwell v. Stevens*, 2 Daly [N. Y.], 15, and cases cited; *Holder v. Soulbey*, 8 C. B. N. S., 254; article in 14 Cent. L. J., 206.)

MAXWELL, J.

This action was brought by the defendant in error against the plaintiff in error, to recover the value of an overcoat, which, it is alleged, was lost or stolen from a Pullman car, in which the defendant in error was a passenger, on the Wabash Railway, from St. Louis to Council Bluffs. The court was requested to make special findings in the case, which it did, as follows:

"I find, as the facts proven on the trial of this case: That on the 18th day of April, 1887, the plaintiff took passage at St. Louis for Council Bluffs, on the Wabash & St. Louis R. R., and purchased a sleeping car ticket from

the defendant's agency at St. Louis, entitling him to a lower berth in a sleeping car attached to the train which left St. Louis the evening of that day; that the train left St. Louis at 8:25 P. M.; that a short time before the train left, plaintiff entered the sleeping car, and upon doing so delivered his coat to the porter of the car, who took it and placed it in the vacant upper berth of the section of which plaintiff had secured the lower berth; that, shortly after the train started, the sleeping car conductor passed through the car and took up the ticket which had been purchased by the plaintiff, and gave him in exchange therefor another ticket, known as a 'berth ticket,' which was in turn taken up by the porter soon afterwards, when he prepared the sleeping berth for occupation by the plaintiff; that the next morning when the plaintiff arose, he took out from the upper berth a portion of his clothing, and then saw his overcoat there where it had been placed the evening before by the porter, and where he, the plaintiff, left it; that plaintiff was last to leave his berth, and, with the exception of a gentleman and lady, the last of the passengers to leave the car for breakfast that morning; that plaintiff went out to breakfast at the regular breakfast station, which occupied him about fifteen minutes, and that after breakfast he stood on the rear platform of the sleeper about ten minutes, smoking a cigar, and then went to his berth in the car, the same having been made up, and then discovered that his overcoat was missing; that he immediately called the attention of the conductor of the sleeping car to the fact, who, after first disclaiming any responsibility for the care of the coat, after a time caused a search to be made through the car, in company with the porter, for it, but without finding it, and the coat has been entirely lost to the plaintiff, and was of the value at the time of the loss of \$50. I also find that the conductor left the car at the breakfast station, and went to his breakfast at the same time as the passengers, including the plaintiff, were at their

breakfast, and that during the interval of about twenty-five minutes' absence of the plaintiff from his berth in sleeping car, between the time when he left the car for breakfast and the time when he returned into it, his berth was made up, and his overcoat abstracted.

"CONCLUSION OF LAW.

"I find, as a conclusion of law, that defendant was guilty of negligence in not properly guarding and taking care of property of plaintiff during his necessary absence from defendant's car, and that plaintiff was not guilty of negligence in the matter.

"I therefore find that defendant is liable to the plaintiff for the value of the overcoat, to-wit, \$50, with interest thereon from April 20, 1887, to the first day of this term, \$3.75."

The rules of the company were also introduced in evidence in its behalf, but as the defendant in error had no notice of them, they do not enter into the case. The question presented, therefore, is the liability of a sleeping car company for the loss of necessary wearing apparel of one who had paid the necessary sleeping car charges, and was lawfully riding in one of its cars, which apparel had been placed in the care of the employes of the company. We find no case exactly in point; and as the question is a new one, not only in this state but to a great extent in the other states of the nation, we are practically without precedents to aid us, and must adopt such rule as may seem just and equitable. It may be well to consider what the company undertakes to perform, and also what it does not undertake. The latter proposition will be considered first. It does not undertake to furnish the railway for its cars to run upon, nor the motive power to propel them, and hence is not entitled to compensation for the ordinary carriage of passengers. It does invite, for hire, all passengers holding first class tickets to occupy its cars. In effect it says to all

such passengers, We will furnish you safe, pleasant, commodious cars, with all possible facilities to prevent weariness and fatigue, with comfortable sleeping accommodations and the necessary toilet facilities, if you pay the price demanded in addition to the ordinary fare.

The nature of this undertaking is the question for consideration. On the one hand it is claimed that so far as the company holds itself out as performing the duties of an innkeeper, so far it should be charged with the strict liability of the same. On the other, it is sought to make the liability of the company merely that of a lodging-house keeper. In the very able and carefully prepared briefs of the attorney for the plaintiff in error we find the following objections to charging the company with the liability of an innkeeper. He says:

"It undertakes:

"(1.) To furnish accommodations to 'first class' passengers *exclusively*.

"(2.) To furnish toilet accommodations to *such* passengers.

"(3.) To furnish a certain *specified* seat or bed to *such* a passenger.

"(4.) To furnish a servant who will respond to all *proper* demands on his service by *such* passengers promptly and politely."

But to do these four things for a *limited* time which is agreed upon between it and *each* passenger *in advance*.

It does not make even this agreement with all those who travel by rail. It makes this agreement with first class passengers *exclusively*.

The distinction between an innkeeper and a lodging-house keeper is set forth in many cases, but is very well drawn in the case of *Cromwell v. Stevens*, 2 Daly's Reports, 15 (1867), from pages 21 to 26 inclusive.

After quoting the definition of an inn as given by Chief Justice Oakley in *Wintemute v. Clark*, 5 Sandf., 247, to-

wit: "Where *all* who come are received as guests, without any previous agreement as to the *duration* of their stay or as to the *terms* of their entertainment," and from *Willard v. Reinhardt*, 2 E. D. Smith, 148, in which the distinction between a boarding-house and an inn was declared to be this: "In a boarding-house the guest is under an express contract at a *certain rate* for a *certain period* of time, but in an inn there is no express engagement, the guest being on his way, is entertained from day to day according to his business, upon an implied contract;" and from *Carpenter v. Taylor* 1 Hilt., 195, as follows: "Mere eating-houses cannot be considered as inns. They are wanting in some of the requisites necessary to constitute them inns."

It will be seen that a distinction is attempted to be drawn between the sleeping car company and an innkeeper because only a certain class can occupy such cars, viz., persons holding first class tickets, whereas at an inn all who conduct themselves properly may be entertained. There is great confusion in the decisions as to what constitutes an inn. In *Calye's case*, 8 Coke, 32, it was held that inns were instituted for passengers and wayfaring men. In another case an inn is defined to be a house where the traveler is furnished all he has occasion for while on the way. (*Thompson v. Lacy*, 3 B. & Ald., 283.) Bouvier defines innkeeper to be "the keeper of a common inn for the lodgment and entertainment of travelers and passengers, their horses and attendants, for a reasonable compensation." The innkeeper is bound to take in and receive all travelers and wayfaring persons and entertain them if he can accommodate them, and the same is true of a sleeping car company as to all passengers holding a first class ticket. The fact that persons holding second or third class tickets agree in effect in consideration of lower fare to waive their right to enter a sleeping car does not enter into the case any more than that of a traveler who, to avoid the expense of an inn, should stop at a private house. In any event the company

which sells sleeping car tickets to all first class passengers that may pay the price, to that extent stands in the same relation as an innkeeper who must for hire entertain those asking for entertainment.

A more difficult question is to properly define the word "guest" at a hotel. Parsons defines a "guest" to be one who comes "without any bargain for time, remains without one, and may go when he pleases." (2 Parsons on Contracts, 151.) This is not sufficiently comprehensive to be a proper definition. In *Walling v. Porter*, 9 Am. Law Reg. (N.S.), 618 (35 Conn., 183), the supreme court of Connecticut defines the word "guest" as follows: "A 'guest' is one who patronizes an inn as such. But it is said that none but a traveler can be a guest at an inn in a legal sense." We do not suppose that the court intended in the definition above quoted to lay stress upon the word traveler.

It is used in a broad sense to designate those who patronize inns. In *Wintermute v. Clark*, 5 Sandf., 247, the court say, that in order to charge a party as an innkeeper, it is not necessary to prove that it was only for the reception of travelers that his house was kept open, it being sufficient to prove that all who came were received as guests without any previous agreement as to the time or terms of their stay. A public house of entertainment for all who choose to visit it, is the true definition of an inn. These definitions are really in harmony with each other. Webster defines a traveler as "one who travels in any way." Distance is not material. A townsman or neighbor may be a traveler, and therefore a guest at an inn, as well as he who comes from a distance, or from a foreign country. If he resides at the inn, his relation to the innkeeper is that of a boarder; but if he resides away from it, whether far or near, and comes to it for entertainment as a traveler and receives it as such, paying the customary rates, we know no reason why he should not be subjected to all the duties of a guest, and entitled to all the rights and privileges of one.

In short, anyone away from home, receiving accommodations at an inn as a traveler is a guest, and entitled to hold the innkeeper responsible as such.

This we think is a correct definition of the word "guest," and we adopt the same. (*Berkshire Woolen Co. v. Proctor*, 7 CUSH., 417.)

In the latter case the guest made an arrangement as to the price to be paid per week, and it was held that this did not take away his character as a traveler and guest. (See also, *Hall v. Pike*, 100 Mass., 495; *Norcross v. Norcross*, 58 Me., 163; *Pinkerton v. Woodward*, 33 Cal., 557, and a valuable article in 14 Cent. Law Journal, 206; *Hancock v. Rand*, 17 Hun, 279.)

In *Dunbier v. Day*, 12 Neb., 597, this court held that an innkeeper was bound to take all possible care for the safety and security of the goods, money, etc., of his guests while in his house. And if the goods or money of a guest be stolen from the inn through no fault or neglect of the guest, nor by a companion guest, and there is no evidence to show how it was done, or by whom, the innkeeper is liable for the loss. This, we think, is a correct statement of the law.

A lodger is defined by Bouvier to be "one who inhabits a portion of a house of which another has the general possession and custody."

There is some confusion in the decisions, arising mainly from the want of a clear definition of what constitutes a guest as distinguished from a mere lodger. Generally, however, a lodger is one who, for the time being, has his home at his lodging place. (*Phillips v. Evans*, 64 Mo., 17.) The rule under the decisions is not of universal application, but nearly so. (*Phillips v. Henson*, 30 Moak, 19; *Thompson v. Ward*, L. R. 6 C. P., 327; *Bradley v. Baylis*, 8 Q. B. D., 195; *Ness v. Stephenson*, 9 Q. B. D., 245; *Hickman v. Thomas*, 16 Ala., 666; *Ullman v. State*, 1 Texas, Court of App., 220.

It will be seen that the engagement of the sleeping car company, so far as it goes, is exactly the same as the duties assumed by an innkeeper. A passenger on entering a sleeping car as a guest—because that is what he is in fact—necessarily must take his ordinary wearing apparel with him, and some articles for convenience, comfort, or necessity. The articles, when placed in the care of the company's employes, are *infra hospitium*, and are at the company's risk.

The liability of innkeepers is imposed from considerations of public policy, as a means of protecting travelers against the negligence and dishonest practices of the innkeeper and his servants. Occasionally, no doubt, the innkeeper is subjected to losses without any fault on his part. This, however, is one of the burdens pertaining to the business, and the courts have deemed it necessary to enforce this wholesome rigor to insure the security of travelers. Besides, where loss is sustained, neither party being in fault, it must be borne by one of them, and it is no more unjust to place it on the innkeeper than on the guest. The liabilities incident to the business are to be considered in fixing the charges for the service. (*Mason v. Thompson*, 9 Pick., 280.)

Except in the matter of furnishing meals, there seems to be no essential difference between the accommodations at an inn and those on a sleeping car, except that the latter are necessarily on a smaller scale than at an inn.

In both cases the porter meets the traveler at the door and takes whatever portable articles he may have with him. He waits upon him and the other passengers in the car so long as they remain therein. The traveler is not required to sit in his seat during the day, but may, if he so desire, go forward into the other cars on the train, and at stations may go out on the platform.

A passenger in a sleeping car need not avail himself of these privileges, but the fact that he may do so, and that

many persons actually do avail themselves of the same, is well known to every traveler, and to the company, and is a circumstance in the case.

If it is said that it would be unjust to hold the company to the same liability as an innkeeper, because thieves might engage one or more berths in a car, and at the first opportunity leave the car carrying what articles they could steal before leaving, the same is true of an innkeeper. Thieves, in the garb of respectable people, may take rooms at an inn, and afterwards steal what they can and escape, yet no one would contend that the innkeeper would not be responsible for the property so stolen, and this whether it is stolen at night or in the daytime; yet in many of the large inns, of this country at least, there are numerous doors for ingress and egress, while in a sleeping car there are but two. Were meals served on a sleeping car, no one would contend that it differed from an inn in its accommodations.

In this state meals are furnished on the through trains, and a passenger need not leave the train from the time of entering it until he reaches the end of the line.

This, however, does not appear to have been the case on the railway in question.

But the fact that meals are taken at designated stations on the line of the road, instead of on the train itself, does not change the character of the service rendered. So far as such services are rendered, they are the same in kind as those furnished by an innkeeper; and the security of travelers, and as a means of protecting them, not only against the negligence but also against the dishonest practices of the agents or employes of the sleeping car company, requires that the company, so far as it renders service as an innkeeper, shall be subject to like liabilities and obligations. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

28	250
51	761
52	675
54	797

JAMES H. PATTERSON V. A. W. L. WOODLAND.

[FILED DECEMBER 17, 1889.]

ERROR PROCEEDINGS: FAILURE TO COMMENCE IN TIME. Proceedings to reverse, vacate, or modify judgments of the district courts must be commenced in the supreme court within one year from the rendition of the final judgment (Code, sec. 592), and if commenced after the period named, they may be dismissed on motion.

ERROR to the district court for Douglas county. Tried below before GROFF, J.

Montgomery & Jeffrey, for plaintiff in error.

Gregory, Day & Day, for defendant in error.

No briefs filed.

MAXWELL, J.

This action was brought in the county court of Douglas county, the judgment being rendered February 9, 1888. On the 18th of that month an undertaking for an appeal to the district court was duly filed and approved. On the 17th of March of that year the transcript was filed in the district court. A motion was thereupon filed by the defendant in error to dismiss the appeal "for the reason that the transcript was not filed within thirty days after the rendition of the judgment." The motion was sustained, to which an exception was taken, and the cause is now brought into this court by petition in error. The record shows that the judgment of dismissal was entered in the district court on the 21st of April, 1888, and the transcript and petition in error were filed in this court on the 6th of May, 1889. The attorneys for the defendant in error now move to "dis-

miss said proceedings in this court, and strike said transcript and petition from the docket" because not filed within a year from the date of the judgment.

Section 592 of the Code provides that "No proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced unless within one year after the rendition of the judgment, or making of the final order complained of, or, in case the person entitled to such proceedings be an infant, a person of unsound mind, or imprisoned within one year as aforesaid, exclusive of the time of such disability; *Provided*, That the provisions of this act shall only apply to judgments or decrees rendered after the date of its taking effect." As the transcript and petition in error were filed after the expiration of a year from the rendition of the judgment, the right to prosecute error had ceased. The motion to dismiss is therefore sustained.

JUDGMENT ACCORDINGLY.

THE other judges concur.

28	251
31	301
28	251
40	314

PHOENIX INSURANCE COMPANY V. MICHAEL T. BOHMAN.

[FILED DECEMBER 17, 1889.]

1. **Officers: ILLEGAL FEES: JOINDER OF CAUSES.** In an action to recover the penalty for taking illegal fees for making out and certifying to certain transcripts of judgments the testimony tended to show that eight of the transcripts were demanded at one time, and were received together and paid for in one sum, although separately itemized in the bill. *Held*, That an instruction which in effect directed the jury to find that there were eight separate causes of action was properly refused.
2. ———: ———: **PENAL STATUTE.** While an officer taking illegal fees is liable to the full penalty of the law, yet the statute, being highly penal in its nature, will not be extended by construction or implication beyond the clear import of its language.

ERROR to the district court for Colfax county. Tried below before POST, J.

Phelps & Sabin, for plaintiff in error, cited: *U. S. v. Willberger*, 5 Wheat. [U. S.], 76; *Am. Fur. Co. v. U. S.*, 2 Pet. [U. S.], 358; *U. S. v. Hartwell*, 6 Wall. [U. S.], 385; *M. P. R. Co. v. Humes*, 115 U. S., 512; *Minn., etc., R. Co. v. Beckwith*, 129 U. S., 26; *Graham v. Kibble*, 9 Neb., 183; *Palmer v. Bank*, 18 Me., 166; *Suydam v. Smith*, 52 N. Y., 385; *Fisher v. R. Co.*, 46 Id., 645; *R. Co. v. Moore*, 33 Ohio St., 384; *Hubbell v. Gale*, 3 Vt., 266.

G. H. Thomas, and *E. T. Hodson*, *contra*, cited: *Haskins v. Alcott*, 13 Ohio St., 210; *Almy v. Harris*, 5 Johns. [N. Y.], 175; *Mayor v. Ordrenan*, 12 Id., 122; *Sturgis v. Spofford*, 45 N. Y., 446; *Fisher v. R. Co.*, 46 N. Y., 644; *Hedman v. Anderson*, 6 Neb., 401; *A. & N. R. Co. v. Jones*, 9 Id., 71; *Jennings v. Simpson*, 12 Id., 564; *Sycamore Co. v. Grundrad*, 16 Id., 537; *Young v. Filley*, 19 Id., 543; *Brooks v. Glenoross*, 2 Mood & Rob., 62; 1 Green., Ev. (13th Ed.), secs. 51, 74; 1 Rapalje & Lawrence, Law Dic., p. 48.

MAXWELL, J.

This action is brought under section 34, chapter 28, of the Comp. Stats. of Neb., to recover the penalties therein prescribed for breach thereof. The section referred to is as follows:

"If any officer whatever, whose fees are hereinbefore expressed and limited, shall take greater fees than are so hereinbefore limited and expressed, for any service to be done by him in his office, or if any such officer shall charge or demand and take any of the fees hereinbefore ascertained and limited, where the business for which such fees are chargeable shall not be actually done and performed, such

officer shall forfeit and pay to the party injured fifty dollars, to be recovered as debts of the same amount are recoverable by law."

There are ten counts in the petition. The answer contains a plea in abatement, a plea of the statute of limitations as to the second count, and a general denial as to the residue. The testimony tends to show that the plaintiff had recovered a number of judgments before the defendant, who was a justice of the peace; that in two of said judgments separate transcripts were demanded and furnished, one of them more than a year before the bringing of the action, and therefore it is conceded was barred; that eight of the transcripts were demanded at one time and furnished and paid for as one transaction. The testimony also tends to show that the transcripts were prepared and the computation of the number of words made by a clerk of the defendant and that the latter relied thereon. This, in a legal sense, is not an excuse, as mistake or ignorance, under the statute, do not constitute a valid defense. (*Cobbey v. Burks*, 11 Neb., 157.)

The clerk evidently erred in counting the number of words. He probably estimated the same from the number of pages. This he had no authority to do, and an over-computation was at the peril of his employer.

The testimony also tends to show that the fees for the eight transcripts were paid for in one sum, \$11.20, and receipted for by the clerk. It is true that the several items of fees are set out in the receipt, but this seems to be principally for the purpose of identifying the transcripts more than as a means of setting out the account.

The plaintiff asked the court to instruct the jury: "You are instructed that the taking and receipting of greater fees than he is entitled to for each transcript, if you should so find, constitutes separate and independent offenses and causes of action, and that for each cause or violation of the law in charging such greater fees, he became indebted to

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the plaintiff in the sum of \$50;" which the court refused to give. This is now assigned for error. The instruction would have withdrawn from the jury the question whether or not there was but one overcharge—one transaction, or eight separate causes, as claimed in the petition. It was, therefore, properly refused.

An officer taking illegal fees is liable to the full penalty of the law. (*Graham v. Kibble*, 9 Neb., 182; *Cobbey v. Burks*, 11 Id., 157; *Crow v. Bowen*, 19 Id., 528.)

But the statute is highly penal in its nature, and will not be extended by construction or implication beyond the clear import of the language.

There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

28	254
29	289
28	254
47	890
28	254
50	69
28	254
62	599

STATE, EX REL. JAMES W. PRIMMER, v. O. R. BRODBOLL.

[FILED DECEMBER 17, 1889.]

Schools: LICENSE MONEY: DISTRIBUTION. The village of L. is partly in three school districts, the school house in each of said districts being outside of the corporate limits of L. The sum of \$1,000 was received by the corporate authorities of that village for liquor licenses therein. In an action for a distribution of said money, *held*, that as the formation of the school districts, under certain conditions, was a power bestowed upon the county superintendent, the presumption was that the districts were so formed for good cause, as to secure a sufficient number of pupils, or for the convenience thereof, or to include taxable property, or all these causes combined, and that the aforesaid districts were entitled to an equal division of the money.

ORIGINAL application for *mandamus*.

W. A. Hampton, and *Sullivan & Reeder*, for relator.

George G. Bowman, for respondent.

MAXWELL, J.

This is an application for a *mandamus* to compel the defendant to pay over certain moneys received for liquor licenses in said village. The defendant demurred to the petition, and the case is submitted on the pleadings. The petition is as follows:

“First—That the village of Lindsay, in Platte county, Nebraska, now is, and since the 8th day of March, 1888, has been, an incorporated village, organized and existing under the provisions of section 40 of chap. 14 of the Statutes of Nebraska, and that the defendant is the duly elected, qualified, and acting treasurer of said Lindsay.

“Second—That said Lindsay includes within its corporate limits two hundred acres of land, one hundred and twenty acres of which now is, and since the incorporation of said Lindsay has been, within the corporate limits of school district 29, in said Platte county, twenty acres of which now is, and since the incorporation of said village has been, within the corporate limits of said school district 18, in said Platte county, and the remaining sixty acres of which now is, and since the incorporation of said Lindsay has been, within the corporate limits of school district No. 70, in said Platte county.

“Third—That the school houses in each of said school districts are located outside of the corporate limits of said Lindsay, and that no school house is now located within the corporate limits of said Lindsay, or has been so located since its said incorporation.

“Fourth—That in the year 1889, and before the commencement of this action, there was paid into the hands of the treasurer of said Lindsay the sum of \$1,000 license

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money, by licensed vendors of malt, spirituous, and vinous liquors of said village, said license being issued and license money paid under the provisions of chapter 50 of the Compiled Statutes of Nebraska and an ordinance of said village passed in pursuance thereof, and that said sum of \$1,000 still remains in the hands of said defendant.

"Fifth—That the whole number of children of school age in school district 18 is sixty-four, of which number four reside within the corporate limits of said Lindsay; that the whole number of children of school age in said school district 29 is fifty-eight, of which number twenty-four reside within the corporate limits of said Lindsay; that the whole number of children of school age in said school district 70 is forty-one, all of whom reside outside the corporate limits of said Lindsay.

"Sixth—That on or about the 20th day of July, 1889, your plaintiff, as treasurer of said school district 18, demanded of the defendant the sum of \$386.50 for the use and benefit of school district 18, said sum being that proportion of said license money which the whole number of children of school age in said district 18 is of the whole number of school children in said three school districts; but said defendant refused to pay to your plaintiff any portion whatsoever of said license money, giving as a reason for such refusal: 'That said moneys could not be used outside of the corporate limits of said Lindsay.'"

Section 5, article 8, of the Constitution provides that "All fines, penalties, and license moneys arising under the general laws of the state shall belong and be paid over to the counties, respectively, where the same may be levied or imposed, and all fines, penalties, and license moneys arising under the rules, by-laws, or ordinance of cities, villages, towns, precincts, or other municipal subdivision less than a county, shall belong to and be paid over to the same respectively. All such fines, penalties, and license moneys shall be appropriated exclusively to the use and

support of common schools in the respective subdivisions where the same may accrue."

In *State, ex rel. Helmer, v. Mc Connell*, 8 Neb., 33, this court construed the above provision, and held that license moneys collected under the ordinances of a city belong to the school fund of such city. LAKE, J., in delivering the opinion of the court, said: "In distinguishing the 'fines, penalties, and license moneys arising under the general laws of the state' from those 'arising under the rules, by-laws, or ordinances of cities, villages,' etc., it is evident that reference was had, not to the primary source of the power, but to the immediate authority by which the fine or penalty is imposed, or the license granted.

"By section 345 of the act 'To license and regulate the sale of liquors,' the sale of malt, spirituous, or vinous liquors, or any intoxicating drink, without first obtaining a license to do so, is prohibited and made a highly penal offense. But, as this court has held in the case of *Phillips v. The City of Tecumseh*, 5 Neb., 312, such license can be granted within the limits of an incorporated town or city only by the proper authorities thereof, and under such rules and regulations as they may provide. And by another general act, under which the city of Lincoln was incorporated, authority is given to 'prohibit and suppress tippling shops' altogether. (Gen. Stat., 144.)

"From this it will be seen that, independently of the action of the corporate authorities of the city of Lincoln, by ordinances duly passed, not a single dollar of the money in controversy could have been imposed or collected. We must hold, therefore, that it falls within the second clause of the section, and belongs to the common school fund of the city, of which the defendant is the lawful custodian."

To the same effect are: *Herman v. Crete*, 9 Neb., 350; *School District No. 2 v. Saline Co.*, 9 Id., 404; *State, ex rel. School District, v. Heins*, 14 Id., 477; *State v. Wilcox*, 17 Id., 219.

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The license moneys, therefore, are to be applied to the support of the schools of the corporation; in other words, the school district, or districts, of the municipality are to receive the money. There is no requirement that the school house, or where there is more than one, the school houses, shall be situated within the limits of the municipality. The formation and division of school districts, under certain restrictions, devolves upon the county superintendent. If a district is so formed as to embrace territory not within the limits of the municipality, the presumption is that such territory is necessary to procure a sufficient number of scholars, to secure efficiency in the school, or for the convenience of pupils, or to secure sufficient territory on which to levy taxes which shall not be burdensome, to maintain a prosperous and progressive school or schools; or, for all of these causes and others combined. Whatever the cause for the erection of school districts, they cannot be considered in this connection. Here we find three school districts in the little town of Lindsay. No doubt there is a good reason for the number, which does not appear in this record. The schools are open to the children of school age residing in, or that may come into, that part of the municipality. This is one of the inducements to parents with children of school age to purchase lots and settle in that territory—that schools for the education of all the children of school age in each district are provided. Without such educational advantages, no intelligent parent would think of settling therein.

There is no provision of statute in such case for dividing the license moneys among the schools in proportion to the number of scholars from each school district, nor to make the division in proportion to the extent of the territory of each. It should therefore be applied equally among the districts, and it is so ordered. A writ of *mandamus* will issue to enforce this order.

WRIT ALLOWED.

THE other judges concur.

HOWARD H. BALDRIDGE ET AL., APPELLEES, V. PETER
FOUST ET AL., APPELLANTS.

[FILED DECEMBER 17, 1889.]

1. **Action Quia Timet.** In an action by B. & D. to quiet the title to certain real estate in the city of Omaha it appeared that one H. had conveyed the land in 1857 to one M., with covenants of special warranty; that M. died during the war, and D. M. succeeded to his rights in the land; that, in 1871, D. M. brought an action of ejectment against H. and recovered judgment; that the judgment was still in full force and that B. & D. possessed the title of D. M.: *Held*, That a decree quieting the title of B. & D. was fully sustained by the evidence.
2. ———: **VERDICT: DATE OF FILING OMITTED.** That the failure of the clerk to mark the date of filing on the verdict of a jury will not prevent it from being introduced in evidence in a proper case.
3. ———. *Held*, That the decree was right and fully sustained by the evidence.

APPEAL from the district court for Douglas county.
Heard below before WAKELEY, J.

Joseph H. Blair, for appellant, cited: *Gibson v. Chouteau*, 13 Wall. [U. S.], 92-104; *Wilcox v. Jackson*, 13 Pet. [U. S.], 497; *Irvine v. Marshall*, 20 How. [U. S.], 558; *Fenn v. Holme*, 21 Id., 481; *Van Brocklin v. Tennessee*, 117 U. S., 167; *Patterson v. U. S.*, 2 Wheat. [U. S.], 221; *Foot v. Glover*, 4 Blackf. [Ind.], 313; *Tribble v. Davis*, 3 J. J. Marsh. [Ky.], 634; *Hurt v. Moore*, 19 Tex., 270; *Freeman*, Judgments [3d Ed.], sec. 30c; 1 Greenleaf, Ev. [14th Ed.], sec. 582.

Charles B. Kellar, and *Howard H. Baldridge*, for appellees, cited: *Fitzer v. McCannan*, 14 Wis., 67; *Kellon v. Bevins*, 3 Tenn., 90; *Carr v. Stevenson*, 5 Humph. [Tenn.], 559; *Nye v. Maxwell*, 14 Vt., 14; *Elkins v. Parkhurst*, 17 Id., 105; *Bagley v. Morrill*, 46 Id., 94; *Huntington v. Rip-*

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ley, 1 Root [Conn.], 321; *Elswick v. Nowson*, 9 Dana [Ky.], 269; *Hickman v. Southerland*, 4 Bibb [Ky.], 194; *Cane v. Watson*, Morris [Ia.], 52; *Tyson v. Passmore*, 7 Pa. St., 273; *Brandon v. Fritz*, 94 Id., 88; *Reeder v. Smith*, 1 Har. & M. [Md.], 158; *Easton v. Snarely*, 4 Har. & J. [Md.], 118; *Pierce v. Schaden*, 62 Cal., 283; *Friedman v. Nelson*, 53 Cal., 589; *DeLevillain v. Evans*, 39 Cal., 120; *Everett v. Boardman*, 58 Ill., 429; *Cutler v. Tuffts*, 3 Pick. [Mass.], 272; *Drummond v. Romme*, 1 N. J. L., 75; *Soria v. Davidson*, 53 N. Y., Super. Ct., 52; *Bishop v. Cook*, 13 Barb. [N. Y.], 329; *Haines v. Lindsey*, 4 Ohio, 90; *Bank v. Telegraph Co.*, 30 Ohio St., 555; *Walsh v. Trevanion*, 15 Ad. & E. [Eng. Q. B.], 734; *Young v. Smith*, 35 Beav. [Eng.], 87; *Bailey v. Lloyd*, 5 Russell [Eng. Ch.], 330; Freeman on Judgments, sec. 54.

MAXWELL, J.

This is an action to quiet the title in the plaintiffs to certain real estate in the city of Omaha.

It is alleged in the petition that "the said plaintiffs have the legal title in fee to, and are in peaceable possession of, the following described piece of land, situated in the county of Douglas, and state of Nebraska, to-wit: Beginning on the north line of the south half of the northwest quarter of section 15, township 15, and range 13 east, 6th P. M., at a point eight feet east of the west line of Nineteenth street, as extended and shown on the plat of Horbach's Second addition to the city of Omaha, and running thence south 107 feet, thence west 132 feet, thence north 107 feet, thence east 132 feet to the place of beginning, being a portion of lots 5 and 6, block 4, Horbach's Second addition to the city of Omaha, as the same is surveyed, platted, and recorded, and a strip of land eight feet wide by 107 feet long, out of the west side of Nineteenth street, fronting and adjoining on the east of said fractional lots.

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"And the said plaintiffs further allege that Peter Foust, one of the above named defendants, or his co-defendant, John A. Horbach, in his, the said Foust's, name sets up and claims an estate and interest of the said plaintiffs in and to said premises, which said estate and interest the plaintiffs believe is claimed under and by virtue of a pretended tax deed issued on the 3d day of February, 1874, by A. C. Althaus, treasurer of Douglas county, Nebraska, and recorded in book 15 of deeds, page 419, in the office of the register of deeds of Douglas county, Nebraska, pretending to convey the said premises to said Foust, under a purchase of said premises on the 2d day of October, 1871, at a treasurer's sale for the taxes of 1870.

"And the said plaintiffs further allege that said treasurer's deed is null and void, and conveys no title to said premises to the said Foust, but that said claim and interest in said premises, by virtue of said pretended deed, thereby beclouds the title of the plaintiffs thereto, and if the said Foust has any interest in said premises it is only the interest of a lienor who has paid taxes on said property.

"But the aforesaid plaintiffs allege that the said Foust himself did not pay any taxes or purchase said property, or receive the certificates from the treasurer of Douglas county for the purchase of said property, but that said taxes were paid and purchase made by said John A. Horbach, one of the defendants in this case, who at that time claimed the title to said premises, and that he paid said taxes in the name of Peter Foust, and had the treasurer issue the certificates of sale and the pretended deed in the name of the said Foust, but for his, the said Horbach's, benefit, and for the protection of the title, which he claimed to hold, of said property.

"And the plaintiffs allege that the said John A. Horbach and Lucinda Randolph, defendants, as lienors, by reason of having paid certain taxes on said property, or otherwise, have some pretended interest in the premises,

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which beclouds the title of the plaintiffs thereto. And the said plaintiffs hereby offer and stand ready to pay any and all claims, with lawful interest, which the defendants have against said premises by reason of taxes or assessments paid by them, which have been lawfully assessed against said premises, and which the plaintiffs ought in equity to pay."

To this petition Horbach filed an answer, in which he alleges in substance:

First—That the plaintiffs are not the owners of the legal title of the land in question or have any right of possession therein.

Second—That the defendant Horbach is the lawful owner in fee simple of said land, and is entitled to a decree quieting his title.

He therefore prays that his title to the same may be quieted and confirmed. On the trial of the cause a decree was rendered in favor of the plaintiffs, from which the defendant Horbach appeals to this court.

The testimony tends to show that on the 5th day of December, 1857, John A. Horbach and wife conveyed the property in question to one Alexander McKinney, with covenants of special warranty, "against the said parties of the first part and their heirs, and against all and every person or persons lawfully claiming or to claim the same by, from, or under the said parties of the first part, shall and will warrant and by these presents forever defend," etc. McKinney died during the war, and in January, 1871, one David McKinney, who had succeeded to the rights of Alexander in the land in question, brought an action in ejectment against John A. Horbach, and on the trial of that case a verdict was returned in his favor, and, a motion for a new trial having been overruled, judgment was entered on the verdict. That judgment is still in full force and it is decisive of this case.

There are a number of stipulations in the record which need not be referred to.

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Considerable stress is laid upon the fact that the verdict found with the papers in the ejectment case contained no filing mark, but this is not a fatal objection. It was fully identified as the verdict and the failure of the clerk to enter the date when filed would not prevent it from being used as evidence in the case.

A considerable effort was made on behalf of the defendant to mystify the descriptions of the land and hence the location, but the clear weight of evidence sustains the descriptions set out in the plaintiff's petition.

It is evident that justice has been done in the premises, and the judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

CITY OF BEATRICE V. WILLIAM BLACK ET AL.

[FILED DECEMBER 17, 1889.]

1. **Roads: PRESCRIPTION.** Where a public road has been located by proceedings under the statute and opened and traveled by the public for more than ten years, the public thereby acquire an easement therein, and the court will not examine the original proceedings for the laying out of the road to determine whether or not they were valid.
2. **—: NON-USER OF PART.** The fact that a large portion of the travel over a public road, instead of passing over the entire length of such road, turned off and passed over a shorter route to the city, will not prevent the running of the statute in favor of the public of that portion not generally used where there has not been an entire non-user of such road.

APPEAL from the district court for Gage county. Heard below before APPELGET, J.

28	263
49	187
28	263
61	206
61	811
61	312

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L. M. Pemberton, for the city of Beatrice:

By using the west half of the highway the public retained its rights over the east half, though it did not use the latter for more than five years. (*O'Dea v. State*, 16 Neb., 242; *Moore v. Roberts*, 64 Wis., 538 [25 N. W. Rep., 564]. The road having been used by the public for at least thirteen years, it will be presumed that it had been duly established by the commissioners. (*Langdon v. State*, 23 Neb., 509; *Arnold v. Flattery*, 5 Ohio, 271; *Anderson v. Com'rs*, 12 Ohio St., 635; *Beebe v. Schneidt*, 13 Id., 406; *McClelland v. Miller*, 28 Id., 488.) The evidence shows a complete dedication of the highway, and that the land was sold subject to the same. (*Rathman v. Norenburg*, 21 Neb., 467; *Graham v. Flynn*, Id., 229; *Rube v. Sullivan*, 23 Id., 779 [37 N. W. Rep., 666, and note].

R. S. Bibb, for Wm. and C. S. Black:

There must have been a clear manifestation of an intention to dedicate, and an acceptance by the public. (*Graham v. Hartnett*, 10 Neb., 521, and cases cited; *Rube v. Sullivan*, 23 Id., 783; *Shellhouse v. State*, 110 Ind., 509 [11 N. E. Rep., 484]; *Rozell v. Andrews*, 103 N. Y., 150 [8 N. E. Rep., 513]; *Quinn v. Anderson*, 11 Pac. Rep. [Cal.], 746; *Pavonia L. Ass'n v. Temfer*, 7 Atl. Rep. [N. J.], 423.) A public road is deemed vacated if not used within five years. (*O'Dea v. State*, 16 Neb., 242.)

A. H. Babcock, for C. F. and W. W. Buchanan:

In order to establish a road over private premises by user, the latter must have been with knowledge of the owner, for a period which satisfies the statute of limitations and an acceptance by the public, which latter may be presumed from common use, and the assumption of control and care, such as building bridges. (*Graham v. Hartnett*, 10 Neb., 517; *Rube v. Sullivan*, 23 Id., 779; *Trickey v.*

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Schlader, 52 Ill., 78; *Gwynn v. Homan*, 15 Ind., 201; *Daniels v. R. Co.*, 35 Ia., 129; *State v. Gould*, 40 Id., 372; *State v. Eisele*, 37 Minn., 256 [33 N. W. Rep., 785]; *Irwin v. Dixon*, 9 How. [U. S.], 10.) And this rule as to user does not apply where the land is wild, uninclosed prairie. (*Graham v. Hartnett*, *supra*; *Rathman v. Norenberg*, 21 Id., 467; *Harding v. Jasper*, 14 Cal., 643; *State v. K. C. & C. R. Co.*, 45 Ia., 139.) The public acquires no right over more than the actual width used. (*Watrous v. Southworth*, 5 Conn., 306; *Walker v. Caywood*, 31 N. Y., 51; *Epler v. Niman*, 5 Ind., 459; *Davis v. City Council*, 58 Ia., 889 [10 N. W. Rep., 768].)

MAXWELL, J.

This is an action to enjoin the defendants from obstructing an alleged public road in the city of Beatrice.

It is averred in the petition that "the defendants, Wm. Black and Cochran S. Black, as partners under the name and style of Black Brothers, own lot 32 in Green's subdivision, being a part of the city of Beatrice, Nebraska, and the defendants, Wm. W. Buchanan and Charles F. Buchanan, own lot 1 in block No. 35 of Smith Bros.' addition to said city of Beatrice; that there is a legally established highway running north and south between said two lots, thirty-three feet of which highway is on the west side of said lot 32 in Green's subdivision and thirty-three feet is on the east side of said lot 1 of block 35 in Smith Bros.' addition to the city of Beatrice, Nebraska; that said highway was established long before said Green's subdivision and said Smith's addition were platted and recorded, and have been traveled and used as a public highway for more than ten years last past; that the defendants, Wm. Black and Cochran S. Black, placed a fence across the east half of said highway where it crossed said lot 32 of Green's subdivision and thereby obstructed said highway,

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which fence was, on the 1st day of June, 1887, removed by the plaintiff herein, and that part of said highway opened up to the public use, and the nuisance thereby created was abated; that within the last two months said Chas. F. and Wm. W. Buchanan have built and erected a fence across that part of said highway which passes over said lot No. 1 of block 35 of Smith Bros.' addition to said city of Beatrice, and have thereby obstructed said highway and rendered the west half of it impassable by the public, and have thereby created a nuisance under the claim that they own said lot and have a right to close up said highway; that the defendants own the property as above stated, subject to the public easement created by the location and use of said highway as above stated, and by the aforesaid acts have been guilty of obstructing said highway; that the defendants Black and Black, threaten to rebuild the fence across the east half of said highway at the upper and lower ends of said lot 32 where said highway crosses said lot and threatens to close up said highway at said points, and unless restrained by an order of this court, will do so to the detriment of plaintiff and the public generally who travel said highway; that said highway connects and forms a part of Thirteenth street, in said city of Beatrice, and has always been used in connection with said Thirteenth street, and it is only through that that access can be had to Grant street, in said city (which latter street is one of the main streets running east and west through said city of Beatrice), from Thirteenth street, and by closing said highway defendants prevent access to East Grant street from said Thirteenth street, in said city, and the said highway is wholly within the corporate limits of said city of Beatrice."

To this petition William and Cochran Black filed an answer, in which they admit the incorporation of the city; that they are the owners of the real estate described in the petition, and allege that the public road in question has not been used for five years next before the commencement of

the action, and hence has ceased to be a public road. Chas. F. Buchanan and Wm. W. Buchanan in their answer allege that they hold the title to the property described in the petition only in trust as the administrators of the estate of Job Buchanan, deceased. They also plead non-user of the road for five years.

On the trial of the cause the court rendered a decree as follows :

"This cause came on for hearing upon the petition, the answer of defendants Chas. F. Buchanan and Wm. W. Buchanan, and the evidence, and was submitted to the court, on consideration whereof the court finds that there was no notice given as provided by law, and, therefore, there is no legally laid out road.

"The court finds that that portion of said road lying east of quarter section line has not been used as a public highway for ten years. The court further finds that that portion of said road lying west of quarter section line has been used as a public highway for more than ten years last past. It is therefore ordered, adjudged, and decreed by the court that the injunction be dissolved as to that part of said road lying east of quarter section line, and that injunction be made perpetual as to that part of said road lying west of said quarter section line—a strip two rods wide—and that a peremptory order issue to open said road."

"In 1867 a petition was presented to the county commissioners of Gage county for the location or change of a public road as follows :

"*To the Board of County Commissioners, of Gage County, Nebraska, April Session, 1867:* Your petitioners, landholders and residents in the said county of Gage, would respectfully represent to your honorable body : That the public interests of the county require that the following changes be made in the territorial road from Nebraska City, Otoe county, *via* Helena and Vesta, Johnson county,

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to Beatrice, Gage county, commencing at the northeast corner of the southwest quarter of section 34, town 4, range 6; thence due north to the center (east and west) of the south line of section 27, same town and range; thence east to the southeast corner of section 27; thence north one-half mile; thence east to the center of section 26, town 4, range 6; thence to or near the southeast corner of the northeast quarter of section 24, town 4, range 6; thence to the bridge on Bear creek; thence to the east line of section 25, town 4, range 6; from thence the most feasible and practicable route to intersect with the above named road." This was duly signed by eleven persons.

In accordance with the prayer of the petition the road as prayed for was duly located and recorded, and has been traveled by the public ever since.

The original town of Beatrice was located on the southeast quarter of section 33, and southwest quarter of section 34, town 4, range 6, the northeast corner of the town plat being at the center of said section 34.

The road so changed and located commenced at the center of said section 34 and ran directly north to the north line of the section, thence east, etc., as shown by the plat. The part of this road in controversy is that which lies immediately north of the center of said section 34.

In 1880, A. L. Green, being the then owner of the west half of the northeast quarter of said section 34, laid it out into an addition to Beatrice and platted it as Green's subdivision. Lot 32 of this subdivision is owned by the defendants, the Blacks. The southwest corner of said lot 32 is located in the center of said section 34, and the road, established as above shown, ran across the west side of said lot 32. Just west of Green's subdivision is Smith Brothers' addition to Beatrice, which was laid out and platted in August, 1883, of which the defendants, Buchanans, own lot 1, in block 35, which lot adjoins said lot 32, owned by the Blacks on the west, and has its southeast corner at the cen-

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ter of said section 34. The road or street in question being located directly north from the center of said section 34, and running north on the half section line, ran over these two lots owned by the defendants, Black Bros. and Buchanan Bros. Both lots had been fenced by the defendants, but before the commencement of this action the city had broken down the fence on Black's lot, and thereby opened the road across it, and this action was brought to enjoin them from rebuilding the fence and to require the Buchanans to abate the nuisance made upon said road by the fence around their lot.

The court below seems to have found that no notice of the petition for a road had been given and that therefore the proceedings were void. The road in question was located more than twenty-two years ago and was immediately thereafter opened for travel and has been traveled by the public ever since. In such case the presumption is that notice was duly given. The acquiescence on the part of the owners of the land over which the road was located for so long a period bars them and their grantees from questioning the proceedings by which the road was located. The case resembles that of a party who claims title to real estate by adverse possession where the original title under which he claimed the premises and occupied the property was invalid and would have been set aside in a proper proceeding. After the lapse of ten years, however, objections to such deed cannot be raised because by the acquiescence of the parties claiming an interest in the land the adverse occupant has obtained by lapse of time an estate in fee in the land and the court will not look at the original title except for the purpose of determining the boundaries of the tract. So in the location of a public road. If a petition is duly presented to the proper tribunal praying for a public road from one point to another in the county and such petition is granted and the road located and opened for travel and is used by the public generally, the right in the public will

become complete after ten years and the court will not look at the original proceedings to determine the validity of the road but to ascertain the extent of the location. (*Langdon v. State*, 23 Neb., 509 ; *Rathman v. Norenborg*, 21 Id., 467 ; *Graham v. Flynn*, Id., 229.)

It is the policy of the law to quiet the right of the public in the use of public roads in the same time that an adverse occupant will acquire title to real estate. This tends to produce peace and harmony among neighbors and encourages the construction of good roads and bridges and promotes friendship and good-will in every community. The rule would be different if the action was brought before the bar of the statute was complete. It is said, however, that the travel did not pass over that portion of the road between the lots in dispute. On that point the testimony shows that while a larger portion of the travel turned off near one corner of the lots in question and passed diagonally across other real estate to Beatrice, yet the testimony also shows that there was considerable travel over the road in question between said lots. This being the state of the proof it is clear that there is a valid public road of the statutory width between the lots in question and that the city is entitled to have the same opened for travel.

The decree of the district court, therefore, will be modified to conform to this opinion.

JUDGMENT ACCORDINGLY.

THE other judges concur.

H. C. GRAVES ET AL. V. CHARLES F. DAMROW.

[FILED DECEMBER 18, 1889.]

1. **Sale: DELIVERY.** A delivery of personal property by a vendor to a vendee may be actual or symbolical, but it must be by some act indicating a purpose to pass possession of the property, absolutely, to the vendee in order to entitle the vendee to maintain an action of replevin for its possession.
2. ———: **REFUSAL TO DELIVER.** In such case where the vendor refuses to deliver the property in accordance with the terms of his contract of sale, the vendee's remedy would be an action upon the contract for damages for failure to perform the contract of sale.
3. ———: ———: **REPLEVIN NOT THE REMEDY.** Plaintiffs in error through their agent sold and agreed to deliver to defendant in error a bill of trees and shrubbery and received part payment therefor at the time of the contract. The delivery was to be made at a future day. On the day set for the delivery of the property plaintiffs in error refused to deliver the same until the whole amount of the purchase price was paid by defendant in error. When defendant in error tendered the amount unpaid and replevined the property, it was held, that replevin would not lie.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

Sawyer & Snell, for plaintiffs in error, cited *Barrett v. Turner*, 2 Neb., 172; *Goodman v. Kennedy*, 10 Id., 270; *O'Leary v. Iskey*, 12 Id., 136; *Baier v. Humpall*, 16 Id., 127; *Fuller v. Schroeder*, 20 Id., 631; *Kennedy v. Bank*, 7 Id., 59; *Wheeler v. Plattsmouth*, Id., 270; *Aultman v. Reams*, 9 Id., 487; *Kasson v. Noltner*, 43 Wis., 646; *Fletcher v. Sibley*, 124 Mass., 220; *Taylor v. R. Co.*, 74 Ill., 86, 89; *Rawson v. Curtiss*, 19 Id., 456; *Dutcher v. Beckwith*, 45 Id., 460; *Peabody v. Hoard*, 46 Id., 242; *Davidson v. Porter*, 57 Id., 300; *Ewell's Evans on Agency*, pp. 136-7; 1 *Parsons, Contracts*, 44.

D. G. Courtney, for defendant in error, cited: *School Dist. v. McIntie*, 14 Neb., 46.

REESE, CH. J.

This was an action in replevin for the possession of a certain lot of fruit, forest, and shade trees, and shrubbery. The cause was brought into the district court by appeal. The petition of defendant in error, filed in that court, contained, among other averments, allegations that the goods were in the possession of the plaintiff in the action—defendant in error here—having been received by the execution of the order of replevin issuing from the lower court; that prior to the commencement of the action, by defendant in error, he tendered to plaintiff in error the amount due on said goods, but that plaintiff in error, having received a portion of the purchase price, refused to credit defendant in error with the same; that one George W. Dowden, now deceased, was the general and special agent of the said company, Henry Graves & Son, and had authority to sell the trees, giving credit, and collecting the money therefor in the county of Lancaster, and that defendant in error made the contract with plaintiff in error, with and through said Dowden, whereby Dowden agreed to deliver to plaintiff said goods and merchandise; that only a portion of the goods so purchased was delivered by the replevin. The copy of the bill was attached to the petition, showing the portion of the goods purchased which had been received. It was further alleged that the trees and shrubbery were recommended and warranted by said Dowden, as agent of defendant in error, as being sound, healthy, and in good and proper condition, and in all things ready for planting; that the purchase was made upon the said warranty of the trees being in a healthy condition, and that they would continue to grow. It was alleged that, relying on said warranty, defendant in error

purchased the property of the said Dowden, but that they were dead and of no value, and that a very small portion of the bill of trees, so purchased and replevied, had lived and grown.

The prayer of the petition was for the possession of the trees and shrubbery; that the ownership and right of possession might be found in defendant in error, and for costs.

Plaintiffs in error then filed a motion to strike the amended petition from the files, for the reason that it presented issues to the district court that were not before the court from which the cause had been appealed, and were entirely different from those presented in that court. The motion to strike was overruled, when plaintiffs in error filed their answer, denying the allegation of the petition, and alleging that plaintiffs in error were the owners of the property at the time it was taken from them by the order of replevin, and entitled to the same. Judgment was asked for the sum of \$179.20, their alleged value. A jury trial was had, which resulted in a verdict and judgment in favor of defendant in error, who was the plaintiff in the case, for the possession of the property and one cent damages. The cause is now brought to this court by proceedings in error by plaintiffs in error, who were defendants below.

Upon the commencement of the trial, plaintiff in error objected to the introduction of any evidence, for the reason that the petition did not state facts sufficient to constitute a cause of action. This objection was overruled, and properly so, for, in addition to the allegations above referred to, the petition did contain an averment that the plaintiff in the action was the owner of and entitled to the immediate possession of the goods, and that they were unlawfully detained from him by plaintiffs in error. This was sufficient in replevin.

It appears from the evidence that Mr. Dowden, the agent of plaintiffs in error, entered into an agreement with defendant in error, by which he agreed for plaintiffs in

error to sell to defendant in error the bill of trees and shrubbery described in the petition, the same to be delivered to defendant in error in the city of Lincoln. That as a part of that contract it was agreed that defendant in error should deliver to the said Dowden certain clothing at a price then agreed upon, which was received as part payment of the purchase price of the bill of trees and shrubbery. The clothing was delivered to Mr. Dowden in accordance with the terms of the contract.

Upon the trial considerable time was devoted to the inquiry as to whether or not Dowden was authorized to receive payment for the bill of trees in the manner in which it was alleged the payment was made; or, whether in fact he was entitled to receive payment in any form; also, whether or not, in his subsequent settlement with plaintiffs in error, plaintiffs in error recognized the payment by defendant to them and charged up to Dowden the amount received by him and received the money therefor.

As we understand the issues in replevin, both these inquiries were immaterial. Had the payment been made to defendant in error directly, and not to their agent, the action of replevin could still not be maintained. There is no claim that the property was ever delivered to defendant in error, or that plaintiffs in error ever at any time complied with their contract to deliver. It is true that there is some evidence that the trees and shrubbery were separated from others in the possession of plaintiff in error and placed to one side, but there was no delivery; and until such delivery, defendant in error could not maintain an action in replevin. (*Barrett v. Tanner*, 2 Neb., 172; *Goodman v. Kennedy*, 10 Id., 270.)

If plaintiffs in error had failed to comply with their contract in the delivery of the trees, the proper action for defendant in error was for damages for the non-performance of the contract; his damages in such case being the amount paid with legal interest thereon.

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In a suit in replevin the gist of the action is the ownership, and the right to the possession of the property. Defendant in error not being entitled to the possession of the property at the time of the commencement of the action as against plaintiffs in error, the sole question for trial in the district court was one of damages. If the property at the time seized upon the order of replevin was of no value, plaintiff in error would not be damaged by being deprived of its possession, and therefore the extent of his right to recover would be merely nominal. If the property was of any value at the time of its seizure under the order of replevin, that value would be the measure of the damages of plaintiffs in error.

In an action of replevin the issues are very simple, the sole question being as to the right of property and the right of possession at the time of the commencement of the action.

The judgment of the district court is reversed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

THE other judges concur.

ELIZABETH PADEN, APPELLEE, v. JOSIAH PADEN, AP-
PELLANT, AND
JOSIAH PADEN, APPELLANT, v. ELIZABETH PADEN,
APPELLEE.

Consolidated in the District Court.

[FILED DECEMBER 18, 1889.]

1. **DIVORCE : EVIDENCE.** The plaintiff in main action, or action for divorce, having sued the same defendant for divorce, setting up grievances of the same general nature as the cause of action

Paden v. Paden.

in this case, in the same court in the year 1883, in which action there was a trial and decree upon the merits, *held*, that no evidence of facts or conditions of a date anterior to the said date can be considered as tending to prove the cause, or any cause of action set out in the petition in the case.

2. The Evidence in support of the cause of action of *E. P. v. J. P.* examined, and *held*, not to sustain the decree of divorce.
3. The Evidence in the case of *J. P. v. E. P.* examined, and *held*, to sustain the decree of the district court.

APPEAL from the district court for Lancaster county.
Heard below before BROADY, J.

Lamb, Ricketts & Wilson, for Josiah Paden:

Where complainant is guilty of an offense similar to that charged as the basis of the application, no relief can be given. (*Mattox v. Mattox*, 2 Ohio, 234; *Wood v. Wood*, 2 Paige [N. Y.], 108; *Horne v. Horne*, 72 N. Car., 530; *Hall v. Hall*, 4 Allen [Mass.], 39; *Handy v. Handy*, 124 Mass., 394; *Nagel v. Nagel*, 12 Mo., 53.) One guilty of a breach of the marriage vow cannot be allowed to cancel the marriage relation, or enforce rights growing out of it. (*Knight v. Knight*, 31 Ia., 451; *Clapp v. Clapp*, 97 Mass., 531; *Ryan v. Ryan*, 9 Mo., 539.) Cruel treatment, as a ground for divorce, must be unprovoked, or at least wholly disproportionate to the provocation. (*Knight v. Knight*, *supra*; *Coles v. Coles*, 32 N. J. Eq., 547; *Skinner v. Skinner*, 5 Wis., 449.) A wife's cruel treatment must not be the result of her own misconduct. (Cases last cited, and *Johnson v. Johnson*, 14 Cal., 459; *Von Glahn v. Von Glahn*, 46 Ill., 134; *Daiger v. Daiger*, 2 Md. Ch., 335; *Childs v. Childs*, 49 Md., 509; *Harper v. Harper*, 29 Mo., 301; *Richards v. Richards*, 37 Pa. St., 225.) If both parties have a right to divorce neither has. (*Hoffman v. Hoffman*, 43 Mo., 547.) The acts complained of do not constitute cruelty in the legal sense. (*Gleason v. Gleason*, 16 Neb., 15; *Shutt v. Shutt*, 71 Md., 193 [17 Atl. Rep.,

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1024]; *Bailey v. Bailey*, 97 Mass., 373.) Mrs. Paden abandoned her husband, and the latter is absolved from his agreement as to support and the conveyances. (*Shaw v. Ins. Co.*, 69 N. Y., 286; *Palmer v. Ford*, 70 Ill., 369.) The conveyance was without consideration; the wife being already bound to do all that she agreed to do as her part of the agreement. (*Whitaker v. Whitaker*, 52 N. Y., 368; *York v. Ferner*, 59 Ia., 487.)

Pound & Burr (*Cornish & Tibbets* on the same side filed no brief), for Elizabeth Paden, cited: *Kelly v. Kelly*, 51 Am. Rep., 732; *Avery v. Avery*, 33 Kan., 1; *Allen v. Allen*, 31 Mo., 479; *Callahan v. Callahan*, 7 Neb., 38; *Warwick v. Rounds*, 17 Id., 412; *Sycamore Co. v. Gundrad*, 16 Id., 529; *Casebeer v. Rice*, 18 Id., 203; *Powers v. Powers*, 20 Id., 529.

COBB, J.

These causes are brought to this court by appeal from the district court of Lancaster county.

The first suit was brought by the plaintiff and appellee to procure a divorce from her husband, the defendant and appellant.

The second was brought by the plaintiff and appellant to set aside certain conveyances of real estate to his wife, the defendant and appellee, which had been made to her in the adjustment of alleged family broils and difficulties.

The evidence in the divorce proceedings was, by stipulation, made evidence in the second suit, and both were consolidated by the court below.

The plaintiff alleged that on June 30, 1861, at Oak Harbor, in Ottawa county, Ohio, she was married to defendant, and that for ten years last past the parties have been residents of Lancaster county, in this state; and that ever since their marriage she has conducted herself towards the defendant as a chaste, faithful, and obedient wife.

II. That on February 1, 1888, the defendant was guilty of extreme cruelty towards her, without any cause or provocation, in this: that having put on his overcoat to go out of the house, and for no cause whatever, became angry and began to curse and swear, and to use violent language towards plaintiff, calling her all kinds of vulgar and vile names, and taking hold of her person in a rude and violent manner, striking her with his clenched fists, he threw and knocked her to the floor, and threw his whole body and weight upon her with so much violence and force as to injure the whole side, body, and head of plaintiff, so that she was for a long time sick and sore from said injuries; and, after she had got up from the floor, he chased her about the house, jamming her in the door as she was escaping from him.

III. On the 1st day of February he was guilty of extreme cruelty towards her, without any cause or provocation on her part, in the use of violent, indecent, and profane language and conduct, calling her "a God damned bitch," "an old whore," and other like names.

IV. In the spring of 1888, in the presence of plaintiff's daughter, he was guilty of extreme cruelty towards plaintiff, without any cause or provocation, and at divers times during that spring, at their home, in this: that he called her "a whore," "a damned bitch," and other like names, and frequently, during said spring, struck her with his fists, and assaulted and battered her.

V. That he is a man of vicious and vulgar habits, with a quick and bad temper, of a jealous, selfish, and revengeful disposition, and has often declared that he would never live with plaintiff, nor permit her to live with him; and that on the first Monday in April, 1888, on account of his violent conduct and abusive language, she, being in fear of great bodily injuries, if not of her life, left her home, and has since lived apart from defendant, and has supported herself.

VI. That he is a man of large means and property, and is the owner in fee of lot 5, in block 69, situate on Ninth street, between N and M streets, in the city of Lincoln, in said county, of the value of \$8,000; also, of the home of both parties, No. 1505 O street, in said city, worth \$10,000; also, of a tract of land of 320 acres, eight miles southeast of Lincoln, near Cheney, in said county, worth \$12,800; and also of 80 acres, the title being in the name of his brother-in-law, Robert L. Garten, situate near said Cheney station, worth \$3,000; and is also possessed of horses, mules, wagons, and farming implements, worth \$2,000, and a large quantity of grain, worth \$3,000—a total of \$38,800; and that she is without proper means to support herself, or to maintain a living in the future. With prayer for divorce and alimony, etc.

The defendant answered admitting the marriage and residence as alleged, admitting that he owns the property as described, but denying that the correct values were given, and denying every other allegation of the petition.

II. For a further defense, he says that at the time referred to, in the second paragraph of plaintiff's complaint she flew into a passion and attempted to strike him in the first instance with a chair, without any cause or provocation on his part; that to protect himself he took the chair away from her, whereupon she seized a heavy cane and attempted to strike him therewith, and in order to protect himself from injury he was compelled to take the cane away from her, which he did without in any way injuring her person; that thereupon she seized him with both her hands in his beard, as she had repeatedly done before, and threw her whole weight upon her grip in his beard, and before he could loosen her hands pulled him to the floor; that he denies having struck her or of using more force than was necessary to protect himself against bodily injury at her hands.

As to the allegations of the third and fourth paragraphs

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of the petition, he cannot say whether or not he used the words charged, and therefore denies the same, but alleges that he never used profane or vulgar epithets toward her, except under the most trying circumstances, such as stated, or at times when she struck him in the face, or on his person, with some instrument or missile she might have in hand.

As to paragraph five, he denies every allegation therein, except that she left his residence on April 1, 1888.

In answer to paragraph six he alleges that the value of lot 5, block 69, city of Lincoln, does not exceed \$4,000; his residence, No. 1505 O street, \$7,000; the 320 acres of land referred to, \$8,000; the 80 acre tract in the name of Morris Paden, his son, \$2,400; the aggregate value of his personal property is \$2,000—total, \$23,400; that he is indebted to various parties and banks to the amount of \$8,000, by mortgages on the above property, and has no other assets to pay them; and that he has signed paper as surety for her, now outstanding, upwards of \$5,000. He further says that she has in her own right a large amount of property and considerable income; that she has 160 acres of land near the village of Cheney, given to her by her father, with 130 acres of it under cultivation, out of which she will realize the present year \$450; also, a house and four lots in Cheney, worth \$600; that in the year 1874 he conveyed to her the northwest quarter of section 6, town 6, range 2 west, adjacent to the town of Geneva, Nebraska, which was paid for with his own money and is of the value of \$16,000, and which defendant claims he is the owner of, excepting the legal title stands in her name; that said land has 130 acres under cultivation, and will realize to her a rental for the current year of about \$450.

He further says that on ———, 187—, he purchased with his own money, but caused to be conveyed to her, lots 11 and 12 of block 6 of the Capitol addition to the city

of Lincoln, which she still holds and owns, of the value of \$5,000, and that she has personal property of the value of \$300.

III. He further alleges that he has at all times conducted himself toward her as a faithful and chaste husband; that he has never used any violence towards her; that she has for some years been very nervous and excitable in temperament and dictatorial in her methods; that on the slightest provocation, and many times without any known provocation, she would fly at him, with an uplifted chair or any household implement that might be nearest to her, and attempt to inflict upon him bodily harm, and has repeatedly injured his person with a knife, poker, chair, or other missile, before he could protect himself; that he has never touched her except in cases of such attempted violence, when he has been compelled to ward off the blows by taking from her the missiles she had in hand; that whatever epithets, profane or vulgar, he has at any time used toward her, were used under the most aggravating circumstances, when she had struck him, or was pulling his beard; that for two years past and longer she has, without any cause or reason therefor, denied him the rights of a husband, and has occupied a separate room and bed in his house; that from November 26, 1883, to May 5, 1885, she, without cause or provocation, absented herself from his home, and has in other ways been derelict in her duties as a wife; with prayer that the bill be dismissed, etc.

The plaintiff replied, admitting that she was the owner of the house and four lots in the village of Cheney, and of the northwest quarter of section 6, town 6, range 2 west, adjacent to the town of Geneva, and alleges that there is a mortgage thereon of \$2,000, and admitting that she is the owner of lots 11 and 12, in block 6, of the Capitol addition to the city of Lincoln, and alleges that there is a mortgage thereon of \$3,000, and she denies each and every other allegation of new matter set up.

Josiah Paden exhibited an original bill against his wife, who is plaintiff in the foregoing cause, setting up that they were married in June, 1861; that up to the year 1878 four children were born to them, and who were then young; that in November, 1878, the defendant left his home, without any just cause or reason, and as a device to secure the conveyance to herself of certain of plaintiff's real property. The fact that his family must be broken up, and his children scattered abroad, unless she could be induced to return, compelled him to seek her return on any terms, and as she complained of many imaginary ills which had no foundation in fact, she demanded as a condition to her return that he convey to her the northeast quarter of the southeast quarter 27-10-6, in Lancaster county, Nebraska; also, lot 4 of subdivisions of lots 14 and 15 of block 102 of the city of Lincoln; also, lot 5 of block 31 of Dawson's addition to South Lincoln. He was not willing to convey the property to her unconditionally, but, after certain negotiations, was induced to convey the premises to her, through J. M. Ricketts, upon the terms specified in the contract executed between them November 13, 1878, as "stipulations and agreements for the purpose of adjusting and settling family difficulties and misunderstandings."

I. The parties mutually agreed and bound themselves to leave off and forever refrain from the use of vulgar, indecent, and profane language in the presence of any members of their family.

II. Josiah Paden agreed and bound himself thenceforth to refrain from abusive and threatening language towards his wife, and would in his conduct, relations, and associations with her have due regard for her health, happiness, peace, and comfort; that the happiness of his wife and children should be the aim and object of his life; that he would provide for them in as liberal a manner as his circumstances would justify, and in all family relations would

have due regard to the wishes, feelings, and opinions of his wife.

IV. That he would pay all outstanding liabilities incurred for family expenses and necessities as rapidly as his circumstances would justify, and pay the legal expenses in adjusting the present difficulties.

V. That he would make good his promises by conveying to his wife the following real estate: The northwest quarter of the southeast quarter of section 27, of township 10 north, of range 6 east of the 6 P. M.; also, lot 4 of subdivision of lots 14 and 15 of block 102, in the city of Lincoln; also, lot 5 of block 31 of Dawson's addition to the city of Lincoln, to become the sole and separate property to the use and benefit of his wife on the violation of any or all of the stipulations by him to be performed and observed.

VI. Elizabeth Paden, in consideration of the agreements of her husband, and upon the express condition of his full compliance therewith, promised and agreed to forgive and forget all maltreatment and improper and threatening language, and all other grievances heretofore sustained of and from her husband, and return to his home and endeavor to live a happy and contented life, and perform the part of a parent and faithful wife, so far as in her power lay.

VII. That so long as he should comply with his agreements, and conduct himself as a true and upright husband, the property to be conveyed to her should be subject to his care and use, and the common benefit of their family, and the proceeds taken and enjoyed by him as though it was his own property, *provided* he should keep the taxes paid, so long as the income therefrom should be sufficient, and if insufficient, the amount received to be appropriated to the payment of taxes *pro tanto*.

VIII. She further agreed that in all cases when it might be necessary for him to protect his interests by securing and

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paying off indebtedness, that she would sign with him mortgages and deeds to enable him to best manage and protect his remaining estate; or when it might be advantageous to exchange or sell and buy non-available property, she agreed to sign all necessary instruments, provided always that the property for which exchange is made, or that purchased, should be taken in the name of Josiah Paden.

The plaintiff alleges that he faithfully kept his agreements under the contract, but that the defendant, almost immediately upon the settlement, systematically set about to drive him into the commission of some overt act which would violate the spirit or letter of the contract, and complete her title to the premises, and afford her grounds for divorce. To this end she denied him a common bed, assailed him with various dangerous weapons and implements, and repeatedly inflicted upon him serious wounds and bruises, until he was, at times, forced to cry out from very pain.

In the month of March, 1883, she applied for a divorce, alleging cruelty, and vulgar and profane language. In the month of November, following, her complaint was tried in this court, which found against her and denied her application; and, for a period of two years thereafter, she, without any cause or provocation, absented herself from his home, and refused to live with him, or perform the duties of a wife; that in the month of May, 1885, she returned to his home, but soon thereafter, without any just cause or provocation, showed her former temper, and again systematically tried in every way to provoke him to some overt act which would violate the contract, by assaulting him with various weapons and missiles, and pulling his beard, inflicting on his person great pain and suffering; that for two years prior to April 1, 1888, without any just cause or reason, she refused to occupy a common bed with him, or to perform the duties of a wife; that on said day,

without any cause or provocation, she left his house, and has ever since absented herself therefrom, without any reason therefor, or without his having violated any of the terms of the contract.

The plaintiff alleges that she has violated the letter and spirit of every covenant and agreement of the contract on her part; that notwithstanding her violation of all the terms of the contract, she claims to be the real owner of the property, and refuses to reconvey it. The plaintiff, during all the period since the conveyance of the premises to her, has been in the actual possession, and by reason of the premises is entitled to have the same reconveyed to him. He prays that the deed of the parties to J. M. Ricketts, and that of Ricketts to the defendant, of said premises, be set aside, and the title quieted and settled in the plaintiff, etc.

The defendant answered, denying all the allegations of the bill not specially admitted. She admitted the marriage, and the number of children, and the contract, as stated. She alleged that she had faithfully kept all the covenants and agreements of the contract, but that the plaintiff, regardless of it, in the year 1878 commenced a systematic course of abuse and cruel treatment towards her, and continued the same for a series of years thereafter; that during the period he habitually used in the presence of his family coarse, vulgar, indecent, and profane language, and conducted himself in an obnoxious and disagreeable manner; that in violation of his agreement he used during said period obscene language towards her, and at various times used personal violence towards her, beating and striking and choking her, and otherwise maltreating her; that he carried on such treatment until she became fearful that her life was in danger, and therefore left their home in April, 1888; that in violation of his agreement, during all the time since entering into it, he has failed to pay the necessary family expenses and to suitably provide

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for the family, although fully able to do so, by reason of which she has been compelled at various times to do so from her own private property.

She alleges that on November 10, 1878, he conveyed to her the property in the petition described, and on February 3, 1880, he conveyed to her by warranty deed, without conditions, the same property; that she has, since the date of the first conveyance, paid all the taxes and the expenses for the necessary care of it from her own personal property, and with her own means. She alleges that she purchased the fee simple title out of her own estate and money, by deeds from J. H. McMurtry and wife and A. G. Barnes and wife, and her title rests upon these conveyances, and not wholly upon the deed from the plaintiff; that since November 10, 1878, she has had exclusive possession of the property; that on ———, 1884, he brought an action in the district court of this county to set aside the deed to defendant, which was by him dismissed, and thereby consented to a full and quiet enjoyment of the property by defendant. She prays that the title to the real estate be confirmed to her, and that he be debarred from any claim, right, title, or interest therein, and for general relief.

The plaintiff's reply denied each and every allegation of new matter set up by defendant.

On the 21st day of February, 1889, there was a trial to the court, and the testimony of witnesses being adduced in full, the court, upon its own motion, ordered, before the argument of counsel and the consideration of the court, that this cause be consolidated with that of *Elizabeth Paden, plaintiff, against Josiah Paden, defendant*, and that all further proceedings in this, the consolidated action, be had in and under the former case, to all of which consolidation proceedings the parties respectively except.

On the 23d day of February following again came the parties, with their attorneys, and Josiah Paden in open

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court, by his attorney, dismissed his cause of action, without prejudice to a future action, as to lot No. 5, in block No. 31, situate in Dawson's addition to South Lincoln, to which the defendant Elizabeth Paden excepts, and the court, having heard the arguments of counsel, and being fully advised in the premises, finds in the constituent action of *Elizabeth Paden against Josiah Paden* in favor of the plaintiff, and finds that the plaintiff, for more than six months prior to the filing of her petition herein, has been, and now is, a *bona fide* resident of Lancaster county, in this state; and finds that the parties were duly married at the town of Oak Harbor, Ottawa county, Ohio, on June 30, 1861, as set forth, and that ever since said marriage plaintiff has conducted herself toward defendant as a faithful, chaste, and obedient wife; and finds that the defendant Josiah Paden has been guilty of extreme cruelty towards plaintiff, as alleged, and all without just cause or provocation; and finds that plaintiff is entitled to a divorce as prayed for.

And the court further finds that in the constituent action of *Josiah Paden against Elizabeth Paden* there is no equity in the plaintiff's bill, and that the same should be dismissed; also, that no alimony should be granted plaintiff in the constituent action of *Elizabeth Paden against Josiah Paden*, but that the property titles be left and quieted in each party respectively, just as the parties themselves have fixed them by their contract, and that all right of dower of Elizabeth Paden to the lands and estates of Josiah Paden and all right of curtesy of Josiah Paden in the lands and estates of Elizabeth Paden should be destroyed and forever barred.

It is therefore considered and adjudged by the court that the marriage relation heretofore existing between the said Elizabeth Paden and Josiah Paden be, and the same is hereby set aside and wholly annulled, and both parties are released from the obligations of the same.

And it is considered and adjudged by the court that the plaintiff's petition in the constituent action of *Josiah*

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Paden against Elizabeth Paden be, and the same is hereby dismissed; that the plaintiff hereby recover nothing by his said writ, and that the defendant go hence without day.

And it is further considered, adjudged, and decreed that Elizabeth Paden have, possess, and enjoy, with the right to use, sell, and dispose of at her pleasure, the following real estate, to-wit: The northwest quarter of the southeast quarter of section number twenty-seven, in township number ten north, of range number six east of the sixth P. M., Lancaster county, in this state; also, lot number four of subdivision of lots numbered fourteen and fifteen in block numbered one hundred and two of the city of Lincoln, in this state, and all other estates, either personal or real, of which she is now or may become seized, divested of all and every claim, title, or interest by curtesy or otherwise of her said husband.

And it is further considered, adjudged, and decreed that the remaining estates, either personal or real, of the said Josiah Paden, of which he is now possessed, or which he may hereafter acquire, be, and the same are, quieted and confirmed in him, divested of all and every claim of the said Elizabeth Paden by way of dower, alimony, maintenance, or otherwise, and that Elizabeth Paden recover from Josiah Paden the costs of this action, taxed at \$67.45. To all of which findings and decree Josiah Paden excepted, and brought the causes to this court on appeal.

It appears from the record that in 1883 the plaintiff, in the main action, sued the defendant for divorce, in the same court, setting up grievances of the same nature as her cause of action. To that action there was a defense, on trial on the merits, and a decree for the defendant. It was doubtless the intention of counsel who drew the present complaint to confine it to causes arising since that date, and, indeed, so far as the petition is concerned, that intention seems to have been carried out. But the evidence, probably in defiance of counsel, is made to cover a longer period and a broader field.

The cause of action, as I view it, is confined to the occurrences of a single day, except in so far as the general habits, temper, and characteristics of the defendant are sought to be brought under review, either as an aggravation of his acts, or as making more plausible and specious the allegations of the plaintiff and the testimony of her witnesses.

But in reviewing the evidence, to the brief extent deemed necessary, we will be confined to that portion which supports the allegations of the petition. The plaintiff testifies as to the circumstances of the assault on her by the defendant on the first day of February, 1888, alleged in the second paragraph of her petition, and states that she does not know nor remember how the quarrel between them arose or was started; that the defendant was standing by the stove with his overcoat on, and used vulgar and indecent "swearing language," calling her names, and got her down on the floor, and undertook to throw his weight upon her, but that by reason of her being of a wiry nature, and he being bundled up, gave her a chance to get from under him, and she made for the door on the east side of the room, but he prevented her getting out, and she came through the parlor to the front door and opened it, and he resisted her, and they got between the door jambs and the door, and she got the screen open, and he did not keep her from getting out of the house; that she supposed the reason he wanted to get her into the house was to prevent the public knowing they were in a fuss, as there was no one about the house, to her knowledge, except themselves, so that she could have a witness.

Her attention being called, by counsel, to the commencement of the difficulty, and being asked where defendant caught hold of her, she replied that she did not remember; and being asked how she came to fall on the floor, she answered "through his getting her onto the floor"; she did not remember how, the excitement was so great, but she

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thought from the experiences that he was intending to end her life right there, and she broke away from him; that "he threw his body and tried to press and crush her down with his hands and with his body." Being asked to give the exact language he used towards her, she answered, "*God damn,*" and such language as that, and then he added words to these yet; the excitement was so great that she could not remember the real words following that, except the hard names he had been in the habit of calling her, and he called her some of those names. Upon being pressed by her counsel to pronounce those names, and being directed by the court repeatedly to answer, she replied that "she could not tell them just then, if they came to her mind before she left the witness stand, she would tell them." To the question, how badly she was hurt, she answered, "that she was hurt and got so nervous that she did not get over it for several days."

Q. Was you hurt by just being nervous?

A. I was not hurt just by that alone; I don't know as my body was really bruised, that is, to leave spots, but it was more internally than outwardly.

The defendant, when on the stand as a witness, had his attention called to the foregoing testimony, and being asked to state how that matter happened, and what there was of it, replied that at the time of the occurrence he had put on his overcoat to go out; that what the detail of the previous conversation was he did not distinctly remember, but his most definite recollection was, in regard to securing the money to pay some interest that she was owing at one or more of the banks; that after he had gone outside, the plaintiff called him back, as she was in the habit of doing when either he or the children started out to go anywhere, she called them back when she could think of something, and in this instance she recalled him, and got to talking of the matter referred to, in which he did not agree with her; and she up with a chair and raised it to strike him with,

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which he took away from her by wrenching it from her hands, at the same time keeping his eye on the door to make his escape, which was common for him to do when there was a trouble of the kind, and that was the end of it when he got away. But he found she was too close for him to do that, for when he got the chair and set it back, she grabbed a heavy cane, from the corner near by, and raised that to strike witness, and when he had taken that from her, she clutched both hands into his beard and drew him down, and going herself down on the floor, before he could loosen her hands from his beard, but that he did not bear any weight upon her, and was careful in regard to that, as she drew him down; after he had loosened her hands from his beard he got right up, and she raised up and made for the dining-room door, out of which he had gone, and tried to open it; that he was sure of her purpose to go out and halloo abroad and make a public matter of it, as she had done before, and he just held her hands against the door; she then started to go through the parlor, and he followed to prevent her from opening that door, but she had it open, probably six inches, before he reached it, and had commenced an outcry; he then opened the door, and she went out, sat down upon the porch, and said, "Now I am going to have a bill," and called witness "a mean, low lived devil," and many other names of that kind; that he did not in any way touch, strike, or abuse her, except to release himself from her grasp, and that it was not his intention to hurt or injure her in any way.

There was no other witness to this performance except the parties to the suit.

These statements of the parties are conflicting in every important particular. Conceding, however, that the parties stand on an equality as to credibility and intelligence, it is not possible to say which account is true or which false. They are irreconcilable with each other and with

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the average moral condition of connubial broils. In such exigency the rule of equity must follow that of the science of logic and the law of mechanics. That postulate implying relief, or seeking evolution, must fail of its purpose for the want of moral consistency or material weight.

The charge in the third cause of action, as stated, though in different language, must refer to the same transaction testified to by the parties. It is alleged to have occurred on the same day, and, if a separate and distinct charge, is without any evidence to support it whatever. Neither the plaintiff nor defendant, in their testimony, mention any other altercation of that day, or about that time, than the principal one referred to.

The testimony of the two daughters of the parties, especially that of Mistress Minnie, is outspoken and comprehensive, and is confessedly damaging to defendant in a very general way, but contains nothing tending to prove the specific allegations of the petition. The same may be said of that of the son, Morris Paden, except that his evidence is equally damaging to the plaintiff, and tends to establish the recriminations of the answer, as to her aggravating conduct towards the defendant.

As to the second action, consolidated in the court below with the cause for divorce, its aim and purpose was to set aside the deeds of Josiah Paden, through a trustee, to his wife Elizabeth, on the ground that she had failed to comply with the stipulations of the contract of November 13, 1878, to be kept and performed on her part, as heretofore set out.

While, as stated in regard to the main action, I do not consider that the alleged grounds for divorce are sufficiently proved, the plaintiff being held to the special allegations of her petition, yet I think that sufficient appears in the evidence, which by stipulation and consolidation is made applicable in both cases—that enough is there shown against the plaintiff, when considered in the second case,

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wherein he is proponent—to demonstrate that he does not stand in that blameless condition, free from fault in the treatment of his wife, the defendant, from the time of making the contract to that of the trial in the court below, which is necessary to give him a standing in a court of equity, or entitle him to any part of the relief sought in the bill.

His own testimony, on the one hand, and that of his wife on the other, may be said to offset each other; but that of both daughters and the son, when allowed for their application the entire range of time from November, 1878, to the date of the trial, would tend to cast a large share of the responsibility and censure for the reprehensible condition existing between them, injuriously affecting their family, upon the husband and father. Having reached this conclusion, it is not deemed important to particularize or enlarge further upon this branch of the case. So much, therefore, of the decree of the district court as dissolved the marriage relation of the parties is reversed. So much of said decree as dismissed the bill of Josiah Paden is affirmed; and so much of said decree as seeks and purports to settle and quiet the title of Elizabeth Paden to the property therein described, real or personal, or any rights or interests therein, and so much as seeks and purports to divest the dower interest of Elizabeth Paden in, of, or from any of the real estate of Josiah Paden, is reversed, and the consolidated action is dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

WILLIAM VORCE V. MARIA L. PAGE.

[FILED DECEMBER 31, 1889.]

1. **Attorney: AUTHORITY.** Where an attorney appears in a cause, the presumption is that he has authority and that presumption continues until the want of such authority is established by proof.
2. **——: EVIDENCE.** The question of the authority of such appearance was submitted to the trial jury specially, and they found that the appearance of counsel in proceedings, upon which plaintiff's rights were based, was without authority. *Held*, Under the evidence, the finding of the jury was conclusive.
3. **Service by Publication:** Where service of notice is made by publication, and no appearance is made by the defendant, jurisdiction will be acquired for no other purpose than granting the relief demanded in the petition, and of which notice was given.

ERROR to the district court for Douglas county. Tried below before DOANE, J.

Kennedy & Gilbert, for plaintiff in error.

Savage & Morris, for defendant in error:

The affidavit for attachment is insufficient and all subsequent proceedings were *coram non judice*, and void. (Drake on Attachment, sec. 487 *et seq.*; *Greenwauld v. Bank*, 2 Doug., [Mich], 508; *Quarles v. Robinson*, 1 Chandler [Wis.], 81; *Whitney v. Brunette*, 15 Wis., 67; *Thatcher v. Powell*, 6 Wheat. [U. S.], 119.) Our statute has not changed the rule of the common law, that the husband was not the owner of the wife's real estate, and could only obtain it or subject it to the payment of his debts by proceedings in equity. (Story, Eq. Jur., secs. 1366-1429; *Ogden v. Guice*, 56 Miss., 330; *Schafroth v. Ambs*, 46 Mo., 114; *Armstrong v. Ross*, 20 N. J. Eq., 109; *Priest v. Cone*, 51 Vt., 495.)

REESE, CH. J.

This was an action in ejectment by which plaintiff in error sought to recover from John H. Peterson the possession of the southeast quarter of section 2, in township 14 north, range 11 east, in Douglas county. Soon after the institution of the action defendant in error, Maria L. Page, appeared and asked to be made a party defendant, when she was allowed to intervene as defendant in the action. Peterson, who had possession of the real estate as her tenant, appeared and filed his disclaimer, when the action proceeded against defendant in error alone.

The petition of plaintiff in error was in the usual form. The answer of defendant in error was a general denial of all the allegations of the petition, with the exception of the allegation that she was in possession of the property, which was admitted. A jury trial was had which resulted in a verdict in favor of defendant. Plaintiff brings the case to this court by proceedings in error.

It appears from the evidence, that the real estate in controversy was patented to defendant in error by the United States in the year 1860, and after residing in Douglas county for a time, she, with her husband and family, removed to the state of Pennsylvania. Soon after their removal J. H. N. Patrick instituted a suit in the district court against her and her husband for the sum of about \$300, which it was alleged Patrick had paid as rent on the property which had been occupied by the family during a portion of their residence here. The action was an attachment and the property in dispute was levied upon and notice given by publication.

Prior to the rendition of the judgment the law firm of Redick & Briggs appeared for defendant in error and contested the case in her behalf. No appearance was made by her husband. A judgment was rendered in favor of

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Patrick and against Henry L. Page, the husband of defendant in error, for the sum of \$305.50, and for the satisfaction of which an order of sale was issued and the property sold, the sale confirmed and a deed made. Plaintiff in error is a grantee through *mesne* conveyance of the purchaser at that sale. It was contended by defendant in error upon the trial, and so testified by her, that the firm of Redick & Briggs had no authority to appear for her in the district court and that she had no knowledge of the pendency of the proceedings to subject her land until long after the sale; that their appearance was through a mistake made by them. It was also testified by her husband, Henry L. Page, that he had corresponded with them concerning a piece of property in the city of Omaha, about which there was some question, and that he employed them to look after that property, but that he did not employ them to defend in the suit of Patrick against himself and defendant. This question was submitted specially to the trial jury, and by their special verdict they found that the firm of Redick & Briggs had no authority to appear for defendant in error in that suit, and were not employed by her nor for her. Upon the other questions presented upon the trial the court instructed the jury to return a verdict in favor of defendant in error.

The special finding of the jury must be taken as conclusive that Redick & Briggs had no authority to appear for defendant in error in the suit referred to. While that firm was composed of reputable gentlemen, who certainly would not appear in a case of that kind without believing that they were acting by authority, yet we think, upon the evidence offered, the jury were justified in finding that their appearance was through a misapprehension and not by employment. When an attorney appears in an action as the representative of a party to such action, the presumption of law is that he appears by the authority of the party whom he assumes to represent, but this presumption

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is *prima facie* and may be rebutted by proof that the appearance was without such authority. The appearance of counsel being without the procurement or knowledge of defendant in error, no jurisdiction was conferred thereby.

The next question presented is whether or not the court had jurisdiction to enter the order then made without reference to such appearance. By the allegations of the petition a cause of action was stated against both Henry L. Page and defendant in error, unless the averment that she was a married woman should avoid the liability claimed in the petition; but as that question is not important it will not be here discussed. The affidavit of verification filed with the petition was as follows:

"STATE OF NEBRASKA, } ss.
"DOUGLAS COUNTY, }

"I, J. H. N. Patrick, on oath say, that I am plaintiff in the above entitled cause; that I have read the foregoing petition and believe the fact stated therein to be true. This deponent further says that said defendants are non-residents of this state and are now absent therefrom, and that personal service cannot be made on said defendants in this state; that said defendants have property in this state which plaintiff seeks to appropriate to the payment of his debts; that the plaintiff's claims in the above action is for money paid, laid out, and expended to and for the use of the said defendants and at their special instance and request; that said claim is just and that plaintiff is entitled to recover a judgment therefor. Wherefore plaintiff asks that an order of attachment may issue against said property of said defendants.

J. H. N. PATRICK.

"Subscribed in my presence and sworn to before me this 26th day of September, 1867.

"GEORGE ARMSTRONG, Clerk."

No other affidavit for attachment or of non-residence of the defendants in that action was filed; this affidavit serving the three-fold purpose of the verification of the petition

and affidavit in attachment and an affidavit of non-residence in order to procure service by publication.

The verdict of the jury to which the cause was submitted was as follows :

"We, the jury, impaneled and sworn in the above entitled cause, find upon the issues joined for the plaintiff and against defendant Henry L. Page, and assess his damages at \$305.50, and we do further find that said indebtedness arose for rent of the dwelling house for the use of said defendant during coverture between said defendants.

"G. RUSTIN, *Foreman.*"

The entry of judgment was as follows:

"This cause came on to be further heard upon the motion of B. E. B. Kennedy, attorney for plaintiff, for judgment upon the special verdict of the jury in this case, and the court having examined said matter and the said verdict of the said jury herein, and being fully advised in the premises, and it appearing to the satisfaction of this court that said action is based upon a debt against said defendant for necessary support of the family of the said defendant during coverture, and the jury having found and returned a special verdict herein under the direction of this court, it is ordered and adjudged by the court that the said plaintiff have and recover a judgment against the said defendant Henry L. Page, upon said verdict, for the sum of \$305.50 damages and cost of suit, to be taxed by the clerk. And that the said property attached in this suit be sold as upon execution to satisfy said judgment as the law directs, and that the separate property of the said Maria L. Page be held subject to execution and sale for the satisfaction of said judgment and costs."

Upon this judgment an order of sale was issued, the property levied upon and sold.

It is now contended, First, that the affidavits in attachment, and of the non-residence of defendant, were insufficient; or rather, that no legal affidavits of the kind were

filed—the affidavits referred to being filed before the commencement of the action. It is also contended that the verdict of the jury was not sufficient to support a judgment against defendant in error and that the judgment itself, being against her husband alone, and not against her, her property could not be legally sold for its payment.

While the sufficiency of the affidavit for attachment, and of non-residence, may be a matter of some doubt for the purpose of conferring jurisdiction, yet we are inclined to the belief that the principal difficulty, under which plaintiff in error labors, grows out of the want of a judgment against defendant in error.

As before intimated, the petition was against Henry L. Page and Maria L. Page as defendants, and in which a joint indebtedness was declared upon as against them; that the indebtedness to the plaintiff in that action was incurred at the joint instance and request of the two defendants; and that each was equally liable for the payment of said indebtedness upon their contract. The section of the statute in force at that time, and which the district court evidently had in mind at the time of rendering the judgment, was section 520, at page 483, of the Revised Statutes of 1866. This section was as follows:

“The property owned by a married woman, before her marriage, and that which she may acquire after marriage by descent, gift, grant, devise or otherwise, and the use and profits thereof, shall be exempt from all debts and liabilities of her husband, contracted or incurred by him previous to their marriage, or subsequently thereto, or previous to the time the wife came into possession of such property: *Provided, however,* That all debts contracted for necessary articles for the use and benefit of the family of such married woman shall be excepted from the operation of this section.”

As we have seen, the original action was against Henry L. Page and Maria L. Page as joint debtors, and a joint

judgment against both was demanded. There was no effort to make the property of the wife liable on the ground that the debt was for necessities for the family. The affidavit for attachment, if it could be so termed, makes no reference to such a proceeding. Neither does the published notice intimate anything of the kind. Had the judgment been rendered against both, as sought by the plaintiff in the action, it is quite probable that it might have been conclusive. But no such judgment was rendered, nor does it appear from the verdict of the jury that any such issue was submitted to them. It is quite clear that the jurisdiction acquired, if any was obtained, could extend only to the relief prayed for in the petition, and of which notice was given by publication. Otherwise stated, assuming the affidavit and notice to be sufficient to confer jurisdiction, for the purposes of the action brought, such jurisdiction could go no further, nor be used for a different purpose than that stated in the notice and affidavit, and notice that an action was pending against plaintiff for a personal liability would not confer jurisdiction to make an order that her property should be held subject to the payment of a debt, for the payment of which she was not primarily liable. The judgment would have to follow the notice given.

Finding no error in the judgment of the district court, it is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

HANCOCK & WALTERS V. WILLIAM H. B. STOUT.

28 301
55 393

[FILED DECEMBER 31, 1889.]

1. **The Evidence** is examined, and *held*, not to sustain the verdict. If upon the proof plaintiff was entitled to recover at all, the verdict was for less than plaintiff was entitled to by mathematical calculation.
2. **Instructions.** Where there is any evidence to support an issue presented by a party to an action, he is entitled to have the jury instructed with reference to his theory of the case, if supported by competent evidence and presented by the pleadings. A failure on the part of the trial court to so instruct the jury when requested, *held*, erroneous.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

Sawyer & Snell, for plaintiffs in error.

Webster & Holmes, for defendant in error, cited: *Ridgeway v. Wharton*, 6 H. L. Cas., 268; *Lyman v. Robinson*, 14 Allen [Mass.], 254; *Methudy v. Ross*, 10 Mo. App., 106; *Brown v. N. Y. C. R. Co.*, 44 N. Y., 86; *Martin v. N. W. Fuel Co.*, 22 Fed. Rep., 596; *Matthewson v. Burr*, 6 Neb., 320; *Severance v. Melick*, 15 Id., 614; *Housel v. Thrall*, 18 Id., 488.

REESE, CH. J.

This action was instituted in the district court of Lancaster county, and was for damages alleged to have been sustained by reason of the non-fulfillment on the part of defendant in error, of a contract, by which he employed plaintiffs in error to do certain work and furnished certain material in the construction of the capitol building. It was alleged in the petition that the plaintiffs were a partnership doing business as contractors and builders;

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that defendant was a contractor and builder and was engaged in the erection of the state capitol building in the city of Lincoln; that on or about the 4th day of February, 1888, plaintiff and defendant entered into an agreement in writing, a copy of which is set out in the petition, and was as follows:

"LINCOLN NEB., 12 December, 1887.

"*Mr. W. H. B. Stout:* We, the undersigned, propose to furnish all the material and do the plain and ornamental plastering, according to the plans and specifications, on state house, to be finished by the first of June, 1888, for the sum of (\$3,185) three thousand one hundred and eighty-five dollars. No cementing of piers included.

"HANCOCK & WALTERS."

"OFFICE OF W. H. B. STOUT, CONTRACTOR.

"In reply to yours of December 12, 1887.

"LINCOLN, NEB., February 4, 1888.

"*Hancock & Walters, Lincoln, Neb.:* GENTLEMEN—Your proposal under date of December 12, 1887, to do the plain and ornamental plastering on state house for (\$3,185) three thousand one hundred and eighty-five dollars, is accepted.

Yours truly,

"W. H. B. STOUT."

It was alleged that plaintiffs in good faith entered into the contract, and soon thereafter made preparation for its performance by hiring men, purchasing material therefor, and at all times since the making of the contract they have been ready, able, and willing to faithfully perform the same on their part; but that defendant, in violation of the contract, refused to allow them to perform the same, and has deprived them of the benefit arising therefrom by letting the work to another party. That the reasonable profits which plaintiffs would have made, over and above all expenses, had they been permitted to do the work in execution of the contract, would have been \$1,000, for which judgment was demanded.

By the answer it was admitted that the proposal set out in this petition, and the answer thereto, were made as therein stated, and it was alleged that after the proposal had been made by plaintiffs, and accepted by the agent of defendant, the defendant discovered that the estimate and proposal of plaintiff did not include the plastering of four certain walls not shown in the plans of the building, and four arches which were ordered to be, and had been constructed by the defendant, and did not include the cost of cementing the piers of the building, and thereupon defendant notified the plaintiffs of such omission and requested them to state an additional amount for the entire and complete work of plastering the building, but they refused to do so or make a complete bid for the whole work. That the defendant, desiring to contract with plaintiff, prepared a contract for the entire work of plastering the building, requested them to sign and execute the same, and state the amount for which they would do the work, which they refused to do. Thereupon, on the 10th of February, 1888, after waiting an unreasonable time on plaintiffs, the defendant notified them in writing that unless they were willing to conclude the negotiations and enter into a contract to do the work, he would be obliged to award the contract to another party. Plaintiffs still refused to enter into a contract, and after due notice of his intention so to do, defendant contracted with other workmen to perform it. The reply was in substance a general denial.

A jury trial was had which resulted in a verdict in favor of plaintiffs in the sum of \$90, whereupon plaintiffs filed a motion for a new trial, which was overruled and judgment rendered on the verdict. They now bring the cause to this court by proceedings in error, alleging that the verdict is not sustained by the evidence, being too small.

It is admitted by defendant in error that the verdict, if returned in favor of plaintiffs at all, should have been for a much larger amount, and it is conceded that a new trial

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must be had. Defendant in error has also filed a cross-petition in error, alleging that the district court erred in refusing to give certain instructions, presented by him to be given to the jury.

Upon a careful examination of all the evidence when applied to the instructions of the court, we are unable to see that the verdict of the jury can be sustained. Among the instructions given by the district court were numbers 3, 4 and 5, which we here copy :

"3. You are instructed in this case that the written proposal of the plaintiffs and the written acceptance of the defendant as alleged in the petition, and admitted in the answer, constitute a contract between the parties to this action, binding upon both plaintiffs and defendant, and neither party had a right to change or alter the terms thereof, or cancel or annul the same without the consent of the other.

"4. You are instructed that by the proposition made by the plaintiffs to the defendant, the plans and specifications offered in evidence and relating to the plastering of the capitol building are made a part of the contract between the parties hereto, and should be so considered by you, except that part of the specifications relating to the cementing of piers, the cementing of piers being specially excepted by the plaintiffs in their proposal, should not be considered in this case.

"5. If you find from the evidence that, after the plaintiffs and defendant entered into the contract, plaintiffs were ready, able, and willing to perform said contract, and were prevented from so doing by the defendant letting said work to other parties, and you further find from the evidence that the plaintiffs could have performed their contract as per agreement for a less sum than their contract price with defendant, then you should find for the plaintiffs."

It is conceded that the lowest estimate which could have

been placed upon the value of the profits arising out of the contract, according to the evidence submitted to the jury, was \$239; no witness fixing it at any less sum. This being true, the verdict of the jury was not based upon the evidence and should be set aside.

It was contended by defendant in error that within the knowledge of both parties it was the usual custom, and necessary, that a contract in writing, specifying more particularly the agreement made, should be entered into; that a short time after the correspondence set out in the petition was had, defendant notified plaintiffs that an omission had occurred in the estimates which plaintiffs had made in the examination of the building, and plans and specifications, and to which plaintiffs' attention was called, with a request that they make a bid upon the omitted portion of the work and include the same with the bid which they had previously made, and enter into a contract in accordance therewith, and that a contract, according to the usual custom and forms, and of which plaintiffs had knowledge, was prepared and sent to them at the time; that instead of signing the same they returned it to defendant, refusing to enter into any contract, claiming that the correspondence between them was sufficient.

In this view of the case defendant prepared and submitted to the court three instructions and asked that they be given to the jury, which were refused, and to which refusal the defendant excepted. They were as follows:

"1. If the jury find from the evidence that, at or before the time of the award of the contract by defendant to the plaintiffs, the plaintiffs were informed that it would be required of them to enter into and sign a formal contract for the doing of the work, and that after the award the plaintiffs refused to sign and execute the contract claimed to have been furnished to them, or to sign and execute any contract for the work, after request or notice so to do, then the jury are instructed, as a conclusion of law, from such fact, that

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the refusal of plaintiffs to sign and enter into formal contract might properly be treated by the defendant as a refusal of the work.

"2. If the jury find from the evidence that the signing of a formal contract for the work was contemplated by the parties, at or before the award of the work on plaintiffs' bid to be done, then the failure of the plaintiffs to sign a contract, or to tender to sign a contract for the work awarded to them, unless waived by the defendant, is a waiver of all rights under the award so made.

"3. If the jury find from the evidence that defendant requested plaintiffs to enter into and sign a formal contract for the work awarded to them, and that they refused so to do, or to tender to sign or enter into formal contract for the work, and that after request of defendant to plaintiffs to enter into contract they refused so to do, or to tender to sign a contract for the work so awarded, and that after such refusal the defendant relet the work to other parties, then the jury will find for defendant."

While these instructions cover substantially the same ground, yet we think defendant was entitled to have their substance submitted to the jury. The evidence submitted by the parties was conflicting. If it was true, as claimed by defendant in error, that plaintiffs in error refused to enter into any contract for the performance of the work, knowing at the time they made the bid that such would be required, and that it was the custom of defendant in error to enter into written contracts with the persons to whom they were awarded, we think it quite clear that such a refusal would be an abandonment of the award on their part and that they could not recover damages by reason of the contract having been let to other parties and the work performed by them. As to whether the correspondence between the parties was a completed contract, would depend largely upon the understanding and intention of the parties at the time of the correspondence. If they understood the first com-

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munication to be a proposal and the second an acceptance thereof upon condition that a formal contract was to be entered into in accordance with the usual custom of defendant, then the contract would not be completed so as to bind defendant until the formal contract was entered into. This was a question of fact under the issues presented by the pleadings and evidence which should have been submitted to the jury for their determination.

The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

28	307
33	686

JOSEPH GARNEAU CRACKER COMPANY V. CHILLINGS-
WORTH C. PALMER.

[FILED, DECEMBER 31, 1889.]

1. **Review: PRESUMPTIONS.** A verdict of a jury and judgment thereon will not be set aside as being unsupported by the evidence when the bill of exceptions shows upon its face that all the evidence submitted to the trial jury is not before the supreme court; all presumptions being in favor of the regularity of the proceedings of the district court.
2. **Master and Servant: WORDS AND PHRASES.** An instruction that it was the duty of a master who employed a servant in the use of machinery to "use ordinary and reasonable care and judgment" in providing suitable and safe machinery for the use to which it was to be put, *held*, not erroneous by reason of the use of the word "judgment"; it being synonymous with "prudence" in the sense in which it was used.

ERROR to the district court for Douglas county. Tried below before HOPEWELL, J.

Garneau Co. v. Palmer.

Charles Ogden, for plaintiff in error:

A servant assumes the ordinary risks of an employment, though it be a hazardous one. (*Hayden v. Mfg. Co.*, 29 Conn., 558, and cases cited; 3 Wood, Railway Law, p. 1452.) As to the rule in the case of explosions: *Losee v. Buchanan*, 51 N. Y., 476; *Indiana, etc., R. Co. v. Toy*, 91 Ill., 474; *Columbus, etc., R. Co., v. Arnold*, 31 Ind., 174; *Marshall v. Welwood*, 38 N. J. L., 339; *Green, etc., R. Co. v. Bremer*, 97 Pa. St., 106; *Sykes v. Packer*, 99 Pa. St., 465; *Hard v. Vt., etc., R. Co.*, 32 Vt., 473.

Bradley & Delmatre, for defendant in error:

A servant simply assumes the ordinary risks and others of which he is aware. (*Houner v. Ill. Cent., R. Co.*, 15 Ill., 550; *Chicago, etc., R. Co. v. Harney*, 28 Ind., 28; *Wonder v. Baltimore, etc., R. Co.*, 32 Md., 411; *Coombs v. New Bedford Co.*, 102 Mass., 572; *Ft. Wayne, etc., R. Co. v. Gildersleeve*, 38 Mich., 133; *De Witt v. Pac. R. Co.* 50 Mo., 302; *Kielley v. Belcher, etc., Co.*, 3 Sawyer [U. S.], 500; *Jones v. Yeager*, 2 Dill [U. S.], 64.) The master is negligent if the machinery is so constructed that the servant will be injured by the slightest indiscretion. (*Toledo, etc., R. Co. v. Fredericks*, 71 Ill., 294.) If the servant knows that the machinery is defective, but notifies the master thereof, he may continue at work waiting for its repair for a reasonable time, before he assumes the risk of the accident. (*Crutchfield v. Richmond, etc., R. Co.*, 78 N. Car., 300.)

REESE, CH. J.

The original action was instituted in the district court by defendant in error, and against plaintiff in error for damages resulting from alleged personal injuries caused by the explosion of a steam kettle in which sugar and other articles were being melted for the purpose of manufacturing the ingredients into boiled icing, to be used in the

manufacture of a certain kind of cakes, which were being made by plaintiff in error.

It was alleged in the petition that defendant in error entered into the service of plaintiff in error as a machine cake baker, and while so in the employment of plaintiff in error he was directed by his superior to engage in the manufacture of what was called boiled icing; that for the purpose of making the compound referred to, sugar and other ingredients were placed in a kettle, which was heated by steam; that before defendant in error entered upon the undertaking he informed the plaintiff in error that he was wholly unacquainted with the methods of making icing referred to, and that he was unfamiliar with the machinery of the quality and character employed by plaintiff in error in that work; that plaintiff in error, in total disregard of its duties in that behalf, carelessly, negligently, and knowingly provided an unsuitable, unsafe, and dangerous machine or kettle to be used in the preparation of the icing, and that while in its use, and without fault on the part of defendant in error, it exploded, and he received the injury described in the petition.

The answer of plaintiff in error consisted of a general denial of all the allegations of the petition, except that plaintiff in error was a corporation and that defendant was in its employ at the time referred to in his petition. It also alleged contributory negligence on the part of defendant in error, and that prior to entering upon the business of making the boiled icing, he had represented to the agents of plaintiff in error that he was an expert in the manufacture of said icing, and in the use and management of the machinery by which it was made. The reply was in substance a general denial.

A jury trial was had which resulted in a general verdict in favor of defendant in error, and upon which, after a motion for a new trial had been entered and overruled, a judgment was rendered. The cause is presented to this court by proceedings in error.

A considerable portion of the brief of the plaintiff in error is devoted to a discussion of the evidence upon which the cause was submitted; and it is contended that the verdict was not sustained thereby.

Upon an examination of the bill of exceptions we find that the testimony which was submitted to the jury is not all before us. It was shown that the deposition of two witnesses were submitted, neither of which appears in the bill of exceptions or of the transcript in the case. We cannot, therefore, say that the verdict was not sustained by the evidence, as all presumptions are in favor of the regularity of the proceedings in the district court. And it must be presumed that the evidence fully sustained the verdict of the jury.

It is insisted that the district court erred in instructions given to the jury upon the trial, and also in refusing instructions asked by plaintiff in error, and to which it by its counsel excepted. There were ten instructions given by the court upon its own motion; one given upon the request of defendant in error, and six refused which were asked by plaintiff in error. It could accomplish no good purpose to set out at length all of these instructions. And since the bill of exceptions shows upon its face that it does not contain all the evidence submitted to the jury, the only question which can be here discussed is, whether or not the instruction, of which particular complaint is made, properly states the law under any conceivable state of facts which might be proven under the pleadings. (*Credit Foncier v. Rogers*, 10 Neb., 184.) The instructions asked by plaintiff in error were also founded and based upon the assumed facts of that particular case. But whether the proof showed the facts to be as assumed in the instruction we cannot say. We will therefore give no further time to the instructions asked by plaintiff in error and refused.

The third instruction given by the court upon its own motion is objected to. It was as follows:

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“Third—You are further instructed that it is the duty of a master who employs a servant in the use of machinery to use ordinary and reasonable care and judgment to furnish such machinery as is suitable and safe for the use to which it is put. But if he fails to use such ordinary care and prudence, and injury thereby result to an employe, without the fault or negligence of such employe, then the master is liable.”

The criticism upon this instruction is in use of the word “judgment” in that part of the instruction referring to the ordinary and reasonable care to be exercised by an employer furnishing machinery for those in his service. While it is no doubt true that the word “prudence” as used in the latter part of the instruction is a preferable word, yet, in the sense in which the word “judgment” is used in the instruction, it evidently means substantially the same thing; and so the jury must have understood it. The two words are treated by Webster in his Unabridged Dictionary as being synonymous when used in that sense. The quality of ordinary and reasonable care, and judgment or prudence suggested in the instruction, referred to the provision of such machinery as would be suitable and safe for the use to which it was to be put. Not that the machinery should be safe, but that ordinary and reasonable care and judgment should be exercised in procuring machinery which might be supposed to be suitable and safe. The word “judgment” is also used in substantially the same sense, in the fourth and seventh instructions. While not the most felicitous selection of language, the idea conveyed by it in the sense in which it is used in all these instructions would be synonymous with that of the word “prudence.”

Being unable to detect any errors in the instruction referred to, which require a reversal of the judgment, it will be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

WILLIAM W. BUCHANAN, APPELLEE, V. SIMON P.
WISE ET AL., APPELLANTS.

[FILED DECEMBER 31, 1889.]

1. **The Evidence examined, and held, not to sustain the finding of the district court upon questions of fact.**
2. **Foreclosure: PURCHASERS: EQUITIES.** An attorney instituted an action to foreclose a mortgage on real estate. The mortgagor was deceased, and his heir was not made a party defendant, but pending the action executed a quit-claim deed to the mortgagee, who was plaintiff in the action, and which deed was never recorded in C. county, where part of the land (including that involved in this suit) was situated. Upon the decree of foreclosure being entered, and the land sold, the attorney purchased the same in his own name, and subsequently sold; his grantee taking by warranty deed and holding open and notorious possession, and which possession has continued hitherto. During such possession, S. & Y. purchased ten hundred and eighty acres of the property of the heir of the mortgagor, and received a quit-claim deed reciting the consideration to be \$50, the deed being only a release and quit-claim, but not assuming to convey the land. The conveyance was made to A, who paid no consideration. A subsequently executed a quit-claim, or special warranty deed to Y., without actual consideration being paid, who afterwards conveyed to plaintiff by warranty deed; but aside from the recital in the deed, it was not shown, upon the trial that plaintiff bought *bona fide*, nor that he actually paid any consideration. It was held, First, that the equities of defendant in possession were superior to those of plaintiff who brought suit to redeem from the mortgage; and, Second, that plaintiff, having failed to prove a *bona fide* purchase on his part, he could not recover against any of the defendants.

APPEAL from the district court for Cuming county.
Heard below before CRAWFORD, J.

N. H. Bell, for appellant Wise.

C. C. McNish, and M. McLaughlin, for appellants Graham, Richards, and Keene.

Pemberton & Bush, J. A. Smith, and N. K. Griggs, for appellee.

REESE, CH. J.

This cause was appealed from the decree of the district court of Cuming county.

The plaintiff exhibited his petition in the court below, alleging that he is the owner in fee simple of the following real estate in said county: The southeast quarter of section 12, in township 23 north, of range 5 east, and the northeast quarter of the northeast quarter, and southwest quarter of the southwest quarter of section 6, and the southwest quarter of the northeast quarter of section 22, in township 21 north, of range 4 east of the sixth principal meridian; that on April 2, 1874, Frank Kipp died, intestate, lawfully seized of said premises, leaving as his sole heir Ralph Kipp, from whom he derives title by absolute deed of conveyance; that A. A. Campbell was appointed administrator of the estate of Frank Kipp, deceased, and as such paid all debts of the estate not secured by mortgage, and the county judge of said county by proper decree declared Ralph Kipp heir to the estate; that on January 1, 1874, Frank Kipp executed and delivered to John A. Van Steenberg a mortgage on said premises to secure a note of \$1,000, due January 1, 1879, with interest at twelve per cent, payable annually; that said mortgage not being paid when due, a suit was brought on September 12, 1879, to foreclose the same in the name of John A. Van Steenberg, but actually in the interest of William A. Van Steenberg, the mortgage having been assigned to him prior to the commencement of the suit, which was brought against the administrator of the estate of Frank Kipp and J. H. Warren, who claimed title by virtue of a tax deed issued to him on the premises by the treasurer of said county, pursuant to a sale of the same for taxes, and that on September 7, 1880, a decree of fore-

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closure of the mortgage was taken against said defendants and a sale of the premises ordered; the amount due Warren was determined, and ordered to be paid out of the proceeds of the sale; in pursuance of which, on December 31, 1880, the premises were sold to E. P. Weatherby for \$825, on May —, 1881, the sale was confirmed, and on June 2, 1881, the sheriff's deed therefor was made and delivered to the purchaser.

That neither Ralph Kipp nor plaintiff was a party to the foreclosure suit, nor were the rights of either in any manner affected therein; that the defendants claim title under the sheriff's deed to Weatherby, and Weatherby's conveyance to them; that defendant Wise so claims the southeast quarter of section 12, township 23, range 5; defendants Keene and Richards so claim to own the northeast quarter of the northeast quarter of section 6, township 21, range 4, and defendant Graham so claims to own the southwest quarter of the southwest quarter of section 6, township 21, range 4, and the southwest quarter of the northeast quarter of section 22, township 21, range 4.

That on June 24, 1881, defendant Wise entered into possession of said southeast quarter of section 12, township 23, range 5, and thence forward received the rents and profits, amounting to \$1,000, to his own use; that the other lands described are wild, uncultivated prairie lands; that in the said foreclosure the tax deed of Warren was decreed to be void and was set aside, and the cloud thereby was removed from the title of the premises, but the sum of \$483.14 was found due to Warren upon his tax deed, and made a first lien upon the premises, and was paid in full out of the proceeds of the sale.

That plaintiff hereby offers to pay into court for the defendants, as their interest may appear to be, the full amount of the mortgage and interest, and taxes and interest, after deducting the rents and profits received by defendants, and offers to pay into court for the use of defendants such fur-

ther sums, if any, as the court may find necessary to entitle the plaintiff to fully redeem the premises from the liens of mortgage and taxes, and all liens held by defendants. An accounting is therefore asked of liens and taxes, and of rents and profits on the lands, with privileges of redemption and possession in the plaintiffs, and general relief, etc.

The defendants Graham, Keene, and Richards answered, denying that the plaintiff is seised of the premises described, or any part thereof, or that he has any interest therein to entitle him to redeem the same, or to have possession thereof, or to any relief either in law or equity. They admit that Frank Kipp died intestate, seised of the premises as alleged; that A. A. Campbell was administrator of his estate; that John A. Van Steenberg was the mortgagee of the premises, which mortgage was foreclosed and the premises sold to E. P. Weatherby, the sheriff, as stated; and that neither the plaintiff nor Ralph Kipp were parties to the action, but allege that all proceedings thereunder, down to the possession of the premises by the purchaser, were with the full knowledge of Ralph Kipp, who claimed no title or interest in the premises until the commencement of this suit, and until which time the defendants had no knowledge of the plaintiff's adverse claim of title or interest in said premises.

The defendants set up that if Ralph Kipp had any title or interest in said lands he conveyed the same by deed, on December 13, 1879, to John A. Van Steenberg, the mortgagee in the foreclosure proceedings, a copy of which deed is exhibited, and of the execution of which the plaintiff had due notice; they deny all the allegations of the plaintiff not herein admitted, and pray that the action be dismissed.

The defendant Wise answered, separately, denying that the plaintiff is seised in fee simple of the southeast quarter of section 12, township 23 north, of range 5 east of the 6th principal meridian, in said county, or any part thereof,

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as claimed, or that he has any interest therein, or right of redemption thereof, or is entitled to any relief in law or equity against defendant. He admits that Frank Kipp died intestate, seized of the lands as stated; that A. A. Campbell was his administrator; that John A. Van Steenberg was the mortgagee of the lands; that the mortgage was foreclosed without the plaintiff or Ralph Kipp having been parties to the action, and the land sold, under a decree of the court, by the sheriff to E. P. Weatherby, which sale was confirmed and a deed executed to the purchaser; that defendant claims title thereunder to the southeast quarter of section 12, township 23, range 5, but alleges that the rents and profits have not exceeded \$200; that said purchaser sold the last described premises to A. R. Graham, who, on June 24, 1881, sold and conveyed the same to defendant for \$1,100, which was the full value of the land; that he bought the same in good faith, without notice or knowledge of any title or claim to the same on the part of Ralph Kipp, or of any one else; that he entered upon possession and has continued in the open, notorious, exclusive, and undisputed possession, cultivating it as a farm, and making valuable improvements under a *bona fide* claim of title, without notice or reason to suspect that there existed an adverse title until the commencement of this suit; that during his occupancy he has erected a dwelling house of the value of \$225, a barn worth \$125, a granary worth \$100, fencing worth \$30, putting in cultivation sixty acres at a cost of \$180 and planted trees of the value of \$100, all of the aggregate value of \$760.

Defendant alleges that Ralph Kipp had full knowledge of the institution of the foreclosure suit, and of all the steps taken and the incidents therein to the purchase of the land by Weatherby, the sale by him to Graham, and of the sale by Graham to defendant, and of defendant's possession and improvements thereof, under his claim of title aforesaid; and at no stage of said proceedings, nor at any time since,

did Kipp, or any one for him, assert or claim any title or interest therein, but slept on any rights he may have had, until the commencement of this suit.

The defendant sets up that if Ralph Kipp ever had any title or interest in said lands, he conveyed the same by deed on December 13, 1879, to John A. Van Steenberg, the mortgagee in the foreclosure proceedings, a copy of which conveyance is exhibited, and of the execution of which the plaintiff had due notice; he denies all the allegations of the plaintiff not admitted, and prays to go hence with his costs and recover the value of his improvements on the land in controversy in case the court finds the superior equities of the case with the plaintiff, and he shall be required to yield possession of the premises.

The plaintiff's reply denied each and every allegation of new matter in the defendant's answer contained, and alleged that he purchased the premises, which this action is brought to recover and redeem, in good faith, for a valuable consideration, relying upon the record of deeds of said county for defendant's claim of title, and without any knowledge or notice that any one had claimed any interest therein, except under the sheriff's deed described in his petition.

On April 4, 1887, this cause was submitted to the court below, without the intervention of a jury, and after the hearing of evidence, and upon various motions of amendment of pleadings and continuances until December 15, 1887. In consideration whereof and the court being fully advised, found for the plaintiff generally; and a decree for the plaintiff having been entered, exceptions were taken by all the defendants, and the cause comes to this court on appeal. Subsequently, upon the suggestion of a diminution of record in this court, it was stipulated in writing, by the parties, that the record now here on file be so amended as to conform to the pleadings and evidence, and a decree was entered as follows:

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"On this 15th day of December, 1887, this cause came on for hearing on the amended petition, the answer of defendants Andrew R. Graham, L. M. Keene, and L. D. Richards, and the separate answer of Simon P. Wise, the reply and the evidence, and was submitted to the court; in consideration whereof the court finds for the plaintiff generally, and also finds:

"I. That on April 2, 1874, Frank Kipp died intestate seized in fee simple of the following premises situate in said county of Cuming, Nebraska, to-wit: The southeast quarter (S. E. $\frac{1}{4}$), of section number twelve (12), in township number twenty-three (23) north, of range number five (5) east, and the northeast quarter of the northeast quarter (N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$), and the southwest quarter of the southwest quarter (S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$) of section number six (6), and the southwest quarter of the northeast quarter (S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$) of section number twenty-two (22), in township twenty-one (21) north, of range number four (4) east of 6th P. M., and the said Frank Kipp left surviving him, as his sole heir, his father, Ralph Kipp.

"II. That on January 1, 1874, said Frank Kipp executed to one John A. Van Steenberg a mortgage deed upon said premises to secure the payment of a note of \$1,000, due on January 1, 1879, with interest thereon at the rate of twelve per cent per annum, payable annually.

"III. That default having been made in the payment of said mortgage debt an action was brought in this court on September 12, 1879, to foreclose said mortgage; that said action has brought in the name of said John A. Van Steenberg as plaintiff, but in the actual interest of one William H. Van Steenberg, who was then the owner of said mortgage, it having been before that time duly assigned to him by said John A. Van Steenberg, and that said William H. Van Steenberg was the owner of said mortgage at the commencement of this action, and continued the owner of it until long subsequent to the time of the termination of

said action, and the sale made thereunder as hereinafter stated; that said action was brought as aforesaid against one A. A. Campbell, administrator of the estate of said Frank Kipp, who was then deceased, and one John H. Warren, who then claimed title to said premises by virtue of a tax deed held by him upon said premises, and that upon the 7th day of September, 1880, a decree of foreclosure of said mortgage was rendered in said action against said defendants, the amount due said J. H. Warren for taxes and interest under his tax deed was determined, a sale of said premises was ordered, and an order made that the amount due said J. H. Warren be paid out of the proceeds of said sale, as follows:

"I. The costs of suit, then (II) J. H. Warren, and thereafter (III) the plaintiff, and said J. H. Warren was paid accordingly.

"IV. That pursuant to said decree and order said premises were on the 31st day of December sold by the sheriff of said county to one E. P. Weatherby, who was the attorney for plaintiff in said action, for the sum of \$825.

"V. That on the — day of May, 1881, said sale was confirmed by this court and a deed ordered to be made to the purchaser, said E. P. Weatherby, for said premises, and on the 2d day of June, 1881, said deed was made and delivered by the sheriff of said county to said E. P. Weatherby and was by him duly recorded in the office of the county clerk of said county on the — day of June, 1881.

"VI. That at the time of the commencement of said action for the foreclosure of said mortgage, and at all times thereafter, until long subsequent to said sale and the execution of said sheriff's deed to said E. P. Weatherby, said Ralph Kipp was the owner in fee simple of the said premises and he was not in any manner a party to said foreclosure action and his rights were not in any manner affected by said foreclosure proceedings and sale thereunder.

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"VII. That on the 29th day of April, 1884, said Ralph Kipp sold and conveyed said premises by an absolute deed to one Miles T. Alverson, who on the 24th day of June, 1885, sold and conveyed said premises by deed absolute to one Thomas Yule; that on the 4th day of January, 1886, said Thomas Yule for a valuable consideration sold and conveyed said premises by warranty deed to plaintiff, who at the beginning of this action was the *bona fide* purchaser and owner of said premises, and of all the rights, title, and interest of said Ralph Kipp in and to the same.

"VIII. That said judgment of foreclosure and all proceedings thereunder were void as to said Ralph Kipp and his grantees, including this plaintiff, and that plaintiff is entitled to redeem said premises from said mortgage and from said foreclosure sale.

"IX. That the amount now due on said mortgage is the sum of twenty-six hundred and seventy-five dollars (\$2,675).

"X. That all the interest which defendants have in and to said premises they obtained and hold under and by virtue of said foreclosure sale and sheriff's deed of said E. P. Weatherby.

"XI. That all the taxes and interest thereon at twelve per cent per annum from the time of payment to this time which has been paid by said defendants and their grantors amount, principal and interest, to the sum of \$328.92.

"XII. That plaintiff is now the holder and owner of all of said mortgage by virtue of assignments thereof, duly executed and recorded, from said John A. Van Steenberg and William H. Van Steenberg, to his grantor, said Thomas Yule, except so much of said mortgage as passed to said E. P. Weatherby and his grantees, the defendants, by virtue of said invalid foreclosure sale and proceedings.

"XIII. That the amount of said mortgage to which defendants are entitled by reason of said invalid foreclosure sale and proceedings is the said sum for which said prem-

ises sold, to-wit, the sum of \$825, and interest thereon at twelve per cent per annum from the date of said sale, December 31, 1880, and aggregates the sum total of fifteen hundred and thirteen dollars and eighty-seven cents (\$1,513.87).

“XIV. That plaintiff is entitled to redeem from said mortgage and from said foreclosure sale by paying into this court for the use of defendants, as their interests may appear, said sum of \$328.92, being the taxes and interest paid on said premises by said defendants and their grantors as aforesaid, and also the said sum of fifteen hundred and thirteen dollars and eighty-seven cents (\$1,513.87), being the sum for which said premises were sold to said E. P. Weatherby at said foreclosure sale and the interest thereon as aforesaid, amounting in the aggregate to the sum of eighteen hundred and forty-two dollars and seventy-nine cents.

“It is therefore considered, adjudged, and decreed by the court that the said judgment of foreclosure, in the case of John A. Van Steenberg against said A. A. Campbell, administrator, and said J. H. Warren, rendered by this court, the foreclosure sale and all proceedings thereunder were and are null and void, and are hereby vacated, annulled, and set aside, and the plaintiff be and he is hereby permitted to redeem from said mortgage and foreclosure sale by paying into this court for the use of said defendants, as their interests may appear, the sum of \$1,842.79, within six months from this date, and that upon the payment of said sum of \$1,842.79 into this court as aforesaid by plaintiff, within the time as aforesaid, said plaintiff's title be and the same is hereby quieted and confirmed against said defendants, and each of them, and all persons claiming by, through, or under them, in and to said premises, and each and every part thereof, to-wit, the southeast quarter of section number twelve, in township number twenty-three, of range number five, and the northeast quarter of the

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northeast quarter and the southwest quarter of the southwest quarter of section number six, and the southwest quarter of the northeast quarter of section number twenty-two, in township twenty-one, range number four, all in said Cuming county, Nebraska. And that said defendants, and each and all of them be, and are hereby, forever enjoined from setting up or claiming any right, title, or interest in and to said premises or any part thereof adverse to plaintiff, and that plaintiff recover from defendants the costs of this action.

"It is further considered, adjudged, and decreed that if the plaintiff fails for more than six months from this time to pay into this court for the use of defendants, as aforesaid, the said sum of eighteen hundred and forty-two dollars and seventy-nine cents, as aforesaid, then this action shall be dismissed, and all the costs thereof taxed to plaintiff. The defendants appeal."

In addition to the facts found by the district court, in its findings of fact, it appears beyond question that on the 10th day of May, 1881, and after the sale to him by the sheriff—but before confirmation and execution of the deed which soon after followed—Weatherby for a valuable consideration sold and conveyed by warranty deed to Andrew Graham the southeast quarter of section twelve, in township twenty-three, range five, and that on the 24th day of June, of that year, Graham for the consideration of \$1,100 sold and conveyed the same property to defendant Wise. Neither of the parties purchasing had any knowledge of any claims upon the land by others, and each purchased in absolute good faith. The land was wild and uncultivated; that soon after Wise's purchase he entered into the possession of the property and began improving it, and has remained in open and exclusive possession ever since, cultivating the land as a farm.

While the fact is denied by John A. Van Steenberg in his deposition, in the most direct and positive terms, yet

it is the opinion of the writer that it is conclusively shown that the foreclosure proceedings were instituted by his direction and authority. But whether such was the case we need not now stop to inquire. Mr. Weatherby testified that during the time the foreclosure proceedings were pending he corresponded with said John A. Van Steenberg and the said Van Steenberg was fully aware of the whole matter. He also testified that in 1880 he received a letter from the said Van Steenberg, directing him to accept the deed from Ralph Kipp for the mortgaged property (with other land perhaps) in full satisfaction of the debt and to execute a release of all further claims against the estate of Frank Kipp. This offer was communicated to Ralph Kipp and to Mr. Campbell, the administrator of the estate of Frank Kipp, and was accepted by Kipp, when Kipp and Campbell executed to John A. Van Steenberg a quit-claim deed which we here copy:

"Know all men by these presents, that we, Ralph Kipp, sole heir of Frank Kipp, deceased, and A. A. Campbell, administrator of said Frank Kipp, deceased, as such administrator, and in consideration of the full release and relinquishment by John A. Van Steenberg of all claims and demands by him against the estate of Frank Kipp, deceased, and against the said A. A. Campbell, administrator of said estate, for the payment of two certain promissory notes, made and executed on the 7th day of January, 1874, by the said Frank Kipp during his lifetime, of that date, and delivered to said John A. Van Steenberg for \$1,000 each, bearing twelve per cent interest from the date thereof, and made payable to the order of the said John A. Van Steenberg, one thereof in five years, and the other in six years after the date thereof, and for which said Frank Kipp, at the same time with the execution of said note to secure the payment of the same, mortgaged all of the lands and tenements hereby conveyed to the said John A. Van Steenberg, except the west half of the southeast quarter of

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section twenty-eight, in township twenty-seven north, of range three west, and a full release of the several judgments and decrees of foreclosure in the district court of the sixth judicial district of Nebraska, for and in the respective counties of Pierce and Stanton, and rendered by the consideration of the said court upon said notes and mortgages, and of all costs that have accrued in foreclosure of said notes and mortgages, and of a release and relinquishment of all claims and demands, of any nature whatever, of the said John A. Van Steenberg, against the estate of said Frank Kipp, deceased, and the administrator of the said decedent's estate, and in full satisfaction thereof do hereby grant, sell, remise, release, and forever quit-claim unto John A. Van Steenberg the following described real estate, to-wit:

"The northeast quarter of the northeast quarter, and the southwest quarter of the southwest quarter, in section number six, in township number twenty-one north, of range number four east, and the southwest quarter of the northeast quarter of section number twenty-two, township number twenty-one north, of range number four east, and the southeast quarter of section number twelve, in township number twenty-three north, of range number five east, all in Cuming county, state of Nebraska.

"And the northwest quarter of section number thirty-four, in township number twenty-three north, range number one east, in Stanton county, state of Nebraska.

"Also the southeast quarter and the northwest quarter of section number twenty-five, in township number twenty-five north, range two west, and the southeast quarter of section thirty-five, township thirty-six north, of range three west, and the south half of the southeast quarter and the east half of the southwest quarter of section eighteen, township twenty-six north, range two west, and west half of the southwest quarter of section twenty-eight, in township twenty-seven north, range three west, situated in Pierce county, state aforesaid.

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"Together with all the tenements and hereditaments and appurtenances to the same belonging, and all the estate, right, title, interest, claim, or demand whatsoever of the said Ralph Kipp and A. A. Campbell, administrators aforesaid, of, in, or to the same, or any part thereof. To have and to hold the above described premises with the appurtenances under the said John A. Van Steenberg and to his heirs and assigns for ever.

"Witness our hands and seals this 13th day of December, A. D. 1879.

"RALPH KIPP. [SEAL.]

"A. A. CAMPBELL, *Administrator*.

"In presence of

"L. M. HOGAN.

"A. W. RULOFSON.

"STATE OF NEBRASKA, } ss.
"CUMING COUNTY, }

"On this 18th day of February, A. D. 1880, before me, Uriah Bruner, a notary public in and for said county, personally came the above A. A. Campbell, administrator of the estate of the late Frank Kipp, deceased, who is personally known to me to be the identical person whose name is affixed to the above deed as grantor, and acknowledged the instrument to be his voluntary act and deed.

"Witness my hand and notarial seal, date aforesaid.

"[SEAL.] URIAH BRUNER, *Notary Public*.

"STATE OF ILLINOIS, } ss.
"COUNTY OF —, }

"On the 13th day of December, A. D. 1878, before me, A. J. Davis, a notary public in and for said county, personally appeared the above named Ralph Kipp, who is personally known to me to be the identical person whose name is affixed to the above deed as grantor, and acknowledged the instrument to be his voluntary act and deed.

"Witness my hand and seal, date aforesaid.

"[SEAL.] A. J. DAVIS,
"Notary Public, Town of Fremont."

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This deed was filed for record in Pierce county, where part of the land was situated, July 31, 1883, but was not recorded in Cuming county. The original deed was lost, but a copy was offered and received in evidence. As appears by the copy, which was certified by the recorder of Pierce county, the instrument was acknowledged by Campbell on February 18, 1880, and by Kipp on the 13th day of December, "1878," instead of 1879, the date of the deed. The deed could not have been acknowledged on the date named, as it was not then in existence. It also appears that the certificate of acknowledgment by Kipp fails to show the name of the county in which the acknowledgment was made. As the deed of *Kipp*, it was not entitled to record in Pierce county, and not having been recorded in Cuming county, it did not impart constructive notice to any one, of its contents. Not having been entitled to record, the certified copy of the deed could not, perhaps, be received as such. But it was stated by Mr. Weatherby and Mr. Bruner on the witness stand that the copy introduced in evidence was a correct copy of the deed which was actually made and delivered, and there is no doubt of the fact. This would render it competent evidence, without reference to who made the copy, or whether certified or not. It is shown by Mr. Wetherby that he informed John A. Van Steenberg of the proposed settlement; that he received a letter from that gentleman approving of its terms, etc., and directing Mr. Wetherby to accept the deed and execute the release. This letter was exhibited by Wetherby to Campbell and Mr. Bruner as his authority to act in the premises, and they testified positively to the fact. Mr. Campbell was at that time the duly authorized agent of Ralph Kipp, with authority to act for him. Mr. Bruner prepared the deed and sent it to Kipp on the 6th day of December, 1879, accompanied by the following letter:

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"WEST POINT, NEB., June 6, 1879.

"*Ralph Kipp, Esq., Fremont*: DEAR SIR—Date and sign the enclosed deed in the presence of two witnesses, who will sign their names below the words "In presence of" and go before a notary public who has a seal, and acknowledge the execution of the same, he (the notary public) date and sign, fill blank left for name of notary and affixed seal, and then forward the same to A. A. Campbell, who will see to it that it will not be delivered until Mr. Van Steenberg has signed and given his full release as mentioned in this deed. Yours truly, URIAH BRUNER."

The deed was returned signed, and the signature of Ralph Kipp was fully identified. It was then delivered to Mr. Weatherby, as the attorney for John A. Van Steenberg, and by him recorded in Pierce county, as we have said. The signature was fully proven upon the trial.

Passing for the present all questions of notice and estoppel, this deed divested Kipp of all title to, or interest in, the land in question. He had no title which could be subsequently conveyed, and subject to the rights of Wetherby, acquired under the purchase of sheriff's sale, the receipt of the deed by John A. Van Steenberg canceled his mortgage as against Kipp and the whole title became merged in him. So far as he was concerned the mortgage was satisfied. On the 29th day of April, 1884, Ralph Kipp for the consideration of \$50 executed to Alverson a quit-claim deed to all the property described in the mortgage. Alverson had no interest in the property. The purchase money was paid by Smith and Yule and the title taken in Alverson's name, who was a non-resident, for the purpose of bringing the suit in the United States circuit court. At this time Wise was in possession of the land, and had been for some two and one-half years. On the 24th day of June, 1885, Alverson conveyed to Yule by a quit-claim—or rather a special warranty—deed, and on the 4th day of January, 1886, Yule conveyed to the plaintiff. All the grantees,

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from Kipp to and including plaintiff, were charged with notice of Wise's possession and his right and equity thereunder. It might also be observed that the assignment of the mortgage of John A. Van Steenberg to W. H. Van Steenberg was acknowledged on the 14th day of January, 1884, four years after the receipt by John A. Van Steenberg, through his attorney, of the deed from Kipp.

Under these circumstances, with whom are the stronger equities? To our mind, most clearly with Wise.

But it is contended that Wise's possession gave no notice to plaintiff or his grantor of any other right than such as grew out of the conveyance from Graham, and which was based upon Weatherby's sheriff's deed. That the deed under which he claimed, being of record, plaintiff would be required to look no further. While this may be the rule, where the parties are each acting in good faith, their equities being otherwise equal, yet we cannot see that it should be applied to this case. The chain of plaintiff's title shows upon its face that Kipp had made a quit-claim deed to Alverson for the consideration of \$50, a fraction under five cents per acre for the land. That the deed from Alverson to Yule was little better than a quit claim. (*Comstock v. Smith*, 13 Pick., 116; *Rodgers v. Burchard*, 84 Tex., 462; *Bogy v. Shoab*, 13 Mo., 380; *Oliver v. Pratt*, 3 How., 410.) By it two hundred and eighty acres were conveyed for the express consideration of \$1,000, and for which no actual consideration was paid. And it is not shown anywhere by the testimony of Buchanan — he not being a witness in the case — that his purchase was made in good faith, for value, and without notice. To warrant the action as a *bona fide* purchase it must appear that the purchase was so made, and for a valuable consideration, by proof outside and independently of the recital in the deed, and without notice of the adverse claims, either actual or constructive. (*Harrison v. Boring*, 44 Tex., 255; *Hume v. Franzen*, 73 Ia, 25; *Savage v. Hazard*, 11 Neb., 323.)

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As against defendant Wise, we are unable to see any real ground, either legal or equitable, upon which the decree of the district court can stand.

So far as the case against Graham and Richards and Keene is concerned, the element of possession is wanting, the cases being similar in other respects, and their equities are not so great. The fact that there was no consideration shown by plaintiff as having been paid for the conveyance to him from Yule would prevent a recovery, and so far as they are concerned the case must be deemed to have failed for want of sufficient evidence to sustain the decree. In addition to the authorities above cited upon this point, see *Hume v. Franzen*, 73 Ia., 25; *Rush v. Mitchell*, 32 N. W. Rep., 367; *Lakin v. Sierra Gold Mining Co.*, 25 Fed. Rep., 337.

While it is the opinion of the writer that the foreclosure proceedings in the case of *John A. Van Steenberg v. Kipp* were not void, yet it is not deemed necessary to discuss that part of the case.

The judgment of the district court is reversed and the cause dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

CHRISTIANA HENDRICKSON V. ALBERT N. SULLIVAN.

[FILED DECEMBER 31, 1889.]

28	339
43	70
28	339
44	309
28	339
47	374

1. **Slander.** The petition in an action of slander is examined, and held, to state a cause of action.
2. —: **WORDS ACTIONABLE PER SE.** Words falsely and maliciously spoken of a person, which impute the commission of some criminal offense, involving moral turpitude, for which the party, if the charge be true, may be indicted and punished by law, are actionable *per se*, and no special damages need be alleged nor proved in order to maintain the action.

ERROR to the district court for Cass county. Tried below before CHAPMAN, J.

Christiana Hendrickson, pro se, on the point that the words complained of are actionable *per se*, cited: *Chaplin v. Lee*, 18 Neb., 442; *Call v. Larrabee*, 60 Ia., 212 [14 N. W. Rep., 237]; *Solverson v. Peterson*, 25 N. W. Rep., 14; *Dailey v. Reynolds*, 4 G. Greene [Ia.], 354; *Mayer v. Schleichter*, 29 Wis., 646; *Guard v. Risk*, 11 Ind., 156; Odgers, Libel and Slander, 18.

A. N. Sullivan, pro se:

It is not sufficient to allege that plaintiff has fallen into disgrace and infamy, and has lost credit and peace of mind. (3 Sutherland on Damages, 664; *Woodbury v. Thompson*, 3 N. H., 194; *Beach v. Ranney*, 2 Hill [N. Y.], 309; *Bassell v. Elmore*, 48 N. Y., 561; *Roberts v. Roberts*, 5 B. & S. [117 Eng. C. L.], 384.) The words mentioned in the petition are not actionable *per se*, and as no special damages were averred, the demurrer was properly sustained. (*Geisler v. Brown*, 6 Neb., 259; *Pollard v. Lyon*, 91 U. S., 225.) The objectionable word is in the second person, and is merely one of contempt, and not actionable *per se*. (*State v. Kube*, 20 Wis., 239.)

REESE, CH. J.

This action was instituted in the district court of Cass county, and was for damages alleged to have been sustained by plaintiff by reason of certain alleged slanderous words spoken of her by defendant. A demurrer was filed to the amended petition, assigning as ground therefor that said petition did not state a cause of action in favor of plaintiff and against defendant. The demurrer was sustained and the cause dismissed, to which plaintiff excepted. She now presents the ruling of the district court upon the demurrer for review by proceedings in error.

The amended petition was as follows:

"At the time hereinafter stated the plaintiff was, and has been for a long time prior thereto, engaged in the business of dress-making in the city of Plattsmouth, Nebraska, from which business she was receiving her only means of support. She was an unmarried woman, and had been for more than a year last past and was and had been for a long time prior thereto living alone in a rented room in 'Union Block,' in said city, which room she was occupying as a home and place for carrying on her said business.

"At said times the defendant claimed that the plaintiff was his sub-tenant; that he was entitled to receive the rent money for said room from the plaintiff, and that plaintiff was owing him for about two months' rent on said room.

"Second—The plaintiff complains of the defendant, for that on or about the last days of October, 1885, in said 'Union Block,' and in the hallway near the entrance to plaintiff's said room, the defendant, wickedly intending to injure the plaintiff, in a discourse which he then and there had, of and concerning the plaintiff, in the presence and hearing of divers persons, falsely and maliciously did speak and publish of and concerning the plaintiff the following false and defamatory words, that is to say: 'I guess the old bitch' (meaning plaintiff) 'can pay her rent now, after having so many men running up here nights,' (meaning thereby that the plaintiff was a prostitute; that she was in the habit of entertaining men in said room, her private apartment, in the night time, for lewd and unlawful purposes, and further imputing that plaintiff had carried on unlawful sexual intercourse with said men, for which she had received money enabling her to pay defendant the rent he claimed to be due him on said room, by reason of which the plaintiff has been brought into public scandal and disgrace, and greatly injured in her good name, and has suffered great anxiety and pain of mind and body.

Hendrickson v. Sullivan.

"Third—The plaintiff further complains of the defendant, for that afterwards, and on or about the last days of October, 1885, in said 'Union Block,' and in the hallway near the entrance to plaintiff's said room, the defendant, wickedly intending to injure the plaintiff, in a certain other discourse which he then and there had of and concerning the plaintiff, in the presence and hearing of divers persons, falsely and maliciously did speak and publish of and concerning the plaintiff the following false and defamatory words, that is to say, 'You damned old, crazy, filthy bitch; you old Mother Franks, anybody knows you (meaning plaintiff) are an old filthy bitch, from the men you had running up here last night,' meaning thereby that the plaintiff was a prostitute, a disreputable and unchaste woman, who was in the habit of receiving and harboring disreputable men in said room, her private apartment, in the night time, with whom she carried on an unlawful sexual intercourse, by reason of which slander the plaintiff has been brought into public scandal and disgrace, and greatly injured in her good name, and has suffered great anxiety and pain of mind and body.

"By means of these several premises the plaintiff has sustained damages to the amount of ten thousand dollars, for which, and costs of suit, she asks judgment against defendant."

The principal question presented is whether the words spoken as alleged in the petition were actionable *per se*. If so, it was not necessary for plaintiff to allege nor prove special damages in order to the maintenance of her action. (*Boldt v. Budwig*, 19 Neb., 744.) The general rule governing cases of this kind is, that if the words falsely spoken of a person impute to the party concerning whom the language was used the commission of some criminal offense, involving moral turpitude, for which the party, if the charge be true, might be indicted and punished, the words so spoken are actionable *per se*, and no special damages

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need be averred or proved. (*Chaplin v. Lee*, 18 Neb., 440, and cases there cited.)

Applying this rule to the petition in this case, it is apparent that the demurrer should have been overruled, for, by the innuendoes contained in said petition, the language alleged to have been used imputes to plaintiff not only an adulterous life but the further crime of keeping a place which was resorted to by men for lewd and lascivious purposes. This was sufficient.

The judgment of the district court is reversed, the demurrer overruled, and the cause remanded to the district court for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

ROBERT E. LIVESSEY, APPELLEE, V. FREDERICK C. FESTNER, APPELLANT.

[FILED DECEMBER 31, 1889.]

1. **The Evidence** examined, and *held*, to sustain the findings and decree of the district court.
2. **New Trial: NEWLY DISCOVERED EVIDENCE.** A new trial will not be granted on the ground of newly discovered evidence where the evidence alleged to be newly discovered is merely cumulative to evidence given upon the trial.
3. ———: ———: **CASE STATED.** The defense having been predicated upon the alleged facts that the plaintiff had contracted to place twenty inches of concrete under a certain party wall and had only placed a footing of fourteen inches of concrete thereunder, and the defendant having at the trial called and examined witnesses, including himself, who testified to such facts in respect to the thickness of the concrete as put in, a motion for a new trial, upon a showing that since the trial defendant

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had discovered evidence that the said concrete footing was in fact only twelve and a half or thirteen inches thick, *held*, rightly refused.

APPEAL from the district court for Douglas county.
Heard below before GROFF, J.

H. B. Holsman, for appellant.

Kennedy & Learned, for appellee.

COBB, J.

This cause was appealed from the district court of Douglas county.

The appellee complained in the court below that on April 21, 1887, he entered into a written contract with the appellant to furnish the material and labor necessary to build and complete in a good, first-class, and workmanlike manner the mason and brick work, excavating, concreting, pressed brick, and cut stone work for the erection of a brick store building on the east half of lot 2, in block 167, in Omaha, in said county. A copy of the contract was exhibited. For this work the appellant agreed to pay the appellee the sum of \$5,100. It was also agreed that the appellee should do extra digging and concreting for the sum of \$198, and extra brick work in the basement and first story for the sum of \$120, which sums the appellant agreed to pay. In pursuance of which the appellee alleged that he performed all the work, and furnished all the materials required and specified under said contracts, for the erection of said building between April 21 and August 1, 1887, amounting in the aggregate to the sum of \$5,418, and other extra work amounting to \$7 additional. The appellant at the time was the owner in fee of said lot.

It was alleged that on November 1, 1887, within four months of the time of doing said work and furnishing said materials, the appellee made an account in writing of the

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amount and value of the same, and, after making oath thereto, filed the same, together with the contract, in the clerk's office of said county, and thereby claimed a mechanic's lien on said lot and buildings for the unpaid balance due him from the appellant under said contract, which was \$886, there having been paid prior to said last date the sum of \$4,530; and there was paid for filing the lien, fees of \$3.25; that said sum of \$886, with interest at seven per cent per annum from November 1, 1887, and the fees for recording the lien remain due and unpaid thereon. The appellee asked judgment for the amount due and costs and that the premises be sold to pay the same, etc.

The appellant answered, in the court below, admitting that on April 21, 1887, he entered into a written contract as in the appellee's petition set forth, but denying that appellee performed all the work required of him under said contract, or that he furnished the materials specified. He further set up that the appellee did not build the wall, or lay in concrete, as in the contract required; that said wall was to be used as a party wall; that appellee knew of this fact, and that the concrete was to be made of the depth of twenty inches, and was but fourteen inches, and that when so laid appellant was to receive from adjoining property owner one-half of the cost of its erection, but that by reason of the failure of appellee to do as contracted, appellant was greatly damaged in the sum of \$1,000. And he further averred that the appellee did not receive, nor had he received up to that date, a certificate from the architect entitling him to final payment; and demanded judgment for the difference of said sums in \$110.75, and that the lien of appellee be removed.

The appellee replied denying each and every allegation of the answer.

There was a trial to the court without a jury, upon the petition, answer, replication, and evidence; on consideration whereof the court found there was due to the appellee from

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the appellant, on account of the matters set forth in the petition, the sum of \$922.78 and interest at seven per cent per annum from May 14, 1888; and that on November 3, 1887, the appellee made an account in writing of the items and matters set forth in the petition, together with the written contract existing between the parties, and after making oath thereto, as required by law, filed the same in the clerk's office of said county, and the same was duly recorded therein. The court further found that the appellee had a first valid and subsisting mechanic's lien for said sum of \$922.78 and interest upon the premises described in his petition, to-wit, the east one-half of lot 2, in block 167, in the city of Omaha, in said county, and that the appellee was entitled to have said lien enforced. It was therefore considered, adjudged, and decreed by the court that said appellee have and recover from the appellant, Frederick C. Festner, the said sum of \$922.78 and interest thereon at seven per cent from May 14, 1888, and his costs in this action; and in case the same was not paid within twenty days from the entry of that decree, an order should issue to the sheriff of that county commanding him to sell said premises as upon execution and apply the proceeds thereof in payment of the amount so found due upon the confirmation of said sale. To all of which said findings and decree the appellant excepted on the record and appealed the cause to this court.

There is neither a petition in error, nor assignment of error in this case. Therefore the errors argued by counsel in their brief cannot be considered. The only issue presented by the pleadings is that arising in the allegations of the petition as stated. The contract between the parties was introduced in evidence by the plaintiff. As it appears in the bill of exceptions it is seen that the plaintiff agreed to furnish the material and perform the labor necessary to build, finish, and complete, in a first-class, workmanlike manner, to the full and complete satisfaction of the defend-

ant, all of the mason work, including brick work, excavating, concreting, pressed brick and cut stone for a brick store building to be erected on the half lot therein described; the furnishing of material and performance of labor to be under the supervision and direction of Geo. L. Fisher, architect, and to be in accordance with the plans and specifications, including all writing and figuring on the same, and which plans and specifications were declared to be a part of the contract. The plans and specifications, however, were not introduced in evidence. It seems to have been taken for granted by all parties throughout the trial that the contract in its terms, or the plans and specifications, or some order of the architect, required the concrete footing under one of the walls of the building designated as a party wall to be twenty inches in depth. The plaintiff, as a witness in his own behalf, testified, among other things, that it was the contract and agreement between the parties that the concrete footing under the party wall should be twenty inches in height, and that the concrete of the present building is twenty-two inches thick from one end to the other. On cross-examination he repeated that he made the concrete twenty-two inches. To the question, "When did you make the measurements so that you ascertained the depth of the concrete?" he answered, "At the time we placed it in; and also stated that Nelson, Anderson, and Whitit, men who were working for him at the time, were present when he did it." He further testified in answer to

Q. In what way did you make the measurement, rod or line?

A. No, sir;—we take—with the laborers we generally take—in a trench, that way, we generally drive stakes down to the depth we wish it, and we generally place three stakes, one at the end, at each end, and one in the middle, so they can keep it straight, and we place them probably six or seven feet apart, near the trench.

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Q. The original depth of the concrete was to be fourteen inches, wasn't it?

A. There was only one bargain that I understood, that is all I say; we understood it was to be twenty inches thick, and it was made at the time we started the work; when we dug our trenches out clear through, why we placed all the concrete and put our stakes accordingly for that purpose.

Fisher, the architect, was called as a witness for the plaintiff and was examined and cross-examined at length. He did not state directly the required depth of the concrete footing, nor was he asked the question in direct terms. He was asked, "How thick did Mr. Livesey lay that concrete under the wall?" which he never answered, except inferentially. He stated that he knew at the time the concrete was put in that exceptions were taken to it as not of the requisite thickness. Livesey was ordered by him and by Festner to put on a layer and bring it up to the required thickness; that it was then from seventeen to eighteen inches thick at the time the order was given. In answer to the question, "How thick, if you know, was the last layer put on?" he stated, "Well, I was not there, of course, all the time when the concrete was being put in, so that I could not say exactly in reference to the whole thing. I know that Mr. Livesey put on more concrete at the time, after it was seventeen or eighteen inches thick." The witness stated that he knew what the contract required of Livesey; that witness was the architect of the building. In answer to the question, "Did Mr. Livesey live up to his contract in constructing that concrete base?" he answered, that he supposed that he did up to—in general, or he would not have issued certificates that he was entitled to for payment. The witness further testified that Festner called him down there one day, and he excavated below the concrete, and at a certain point, at the edge, it did not come up to the required thickness, so at that point in the concreting there seemed to be a little doubt. Here the court asked the witness, "What was the

shortage?" and, instead of answering directly, he replied, "Well, we measured it, and, if I remember, we measured about fifteen inches."

Three other witnesses, Nelson, Anderson, and Whitit, who had been employed on the work by Livesey, but not at the time of the trial, stated that the concrete under this wall was more than twenty inches thick, one or two placing it at twenty-four or twenty-five inches, but none had actually measured it; and, upon cross-examination, there was doubt of the correctness of their arrival at the facts testified.

The defendant called a number of witnesses, several of whom had digged down the side of the walls, and measured the concrete footing, and none testified that it was more than fourteen inches in depth.

While to my mind the preponderance of evidence is against the proposition that the concrete footing under the party wall was of the depth of twenty inches, or to exceed fourteen inches, yet it cannot be said that there was not evidence to sustain the findings of the court in favor of the plaintiff. Such finding, therefore, cannot be disturbed for want of proof. The findings and decree of the court were made on the 23d day of July, and on the 3d of August following the defendant offered his motion for a rehearing, in the nature of a new trial, on the ground of newly discovered evidence. I do not think the motion is correctly stated in the transcript: the substance of it is, that, "since the hearing of the cause in this court, additional testimony has been developed in support of its defense." It is an inflexible rule governing courts in deciding applications for a new trial on the ground of newly discovered evidence, that the discovery must not be that of merely cumulative evidence. In this instance, the language of the motion, as we find it of record, amounts well-nigh to an admission that its newly discovered or newly developed testimony is merely additional and cumulative.

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In support of the motion are filed the affidavits of five witnesses, including that of the defendant. He states that since the trial he had discovered that "the plaintiff did not use more than thirteen inches of concrete in making the walls of the building, and that he was not aware, at the time of the trial, of the evidence of that fact." The other four affidavits were those of architects and builders, and were to the effect that since the trial they had, at the request of the defendant, dug down under the wall of the building and had found that the concrete footing under the wall was not to exceed thirteen inches in thickness; one or more stating that it averaged but twelve and one-half inches, and that footings of that thickness were inadequate to support a wall of the weight and character of that in question.

The defendant predicated his entire defense upon the fact that the plaintiff had agreed to place twenty inches of concrete under the party wall, and had only placed a footing of fourteen inches; and the whole trial, including the examination of both parties and a number of witnesses on either side, had been directed to the facts involved in the question of the depth and thickness of the concrete footings.

I do not think that the discovery, after the trial, that the concrete was in fact only twelve and one-half or thirteen inches in thickness, or that in charging his adversary with footings deficient only in six inches of thickness he was too liberal towards him—nor do I think that the discovery of the existence of the fact, and his ability to prove it—can be held to be of that class of evidence the final discovery of which would entitle the party to a new trial on those familiar grounds.

The decree of the district court, and its order overruling the motion for a new trial, are affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

CHARLES WHITE V. STATE OF NEBRASKA.

[FILED DECEMBER 31, 1889.]

28	341
44	421
28	341
58	612

1. **Criminal Law: COMPLAINT: CAPTION.** A title is no part of a complaint, made before a magistrate, charging a person with a criminal offense, and in a complaint charging M. with having committed the crime of larceny, the words "State of Nebraska v. M. and W.," placed in the upper left hand corner of the paper upon which such complaint is written, *held*, not sufficient to make such complaint a joint one against M. and W.
2. ———: ———. A complaint under oath, made before a magistrate, *held*, necessary to give such magistrate jurisdiction to make a preliminary examination of a person accused of a criminal offense.
3. **An Examination**, made by a magistrate, of a person accused of crime, where the magistrate has not jurisdiction, is not a "preliminary examination therefor, as provided by law," in the sense of those words as used in section 585 of the Criminal Code.
4. **An Information**, filed in the district court by the county attorney, against an accused person for an offense for which said accused person had not had a preliminary examination, as provided by law, confers no jurisdiction upon said district court to try and punish said accused person for such offense, unless in the excepted cases provided for in section 585 of the Criminal Code.

ERROR to the district court for Douglas county. Tried below before GROFF, J.

Winfield S. Strawn, for plaintiff in error:

The state had no right to proceed on mere information by the county attorney, and without preliminary examination. (4 Am. & Eng. Encyc. of Law, 730; Cr. Code, secs. 286, 288, 300, 585; *People v. Smith*, 25 Mich., 497; *People v. Chapman*, 62 Id., 290; *State v. Louver*, 26 Neb., 757.) The caption of the complaint, or information, determines nothing. (*State v. Davis*, 41 Ia., 311; *State v.*

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Wyatt, 76 Id., 828.) The sole pretext for holding defendant to answer was a charge of larceny, while the information charges burglary, and the motion in arrest of judgment should have been, for this reason, sustained.

William Leese, Attorney General, for the state:

The transcript of the proceedings before the police judge shows that there was a preliminary examination. No objection was made to jurisdiction until the motion in arrest of judgment, when it was too late. The question should have been raised by a plea in abatement. (*Cowan v. State*, 22 Neb., 519.) The information charges larceny—not burglary, and the verdict was for the former.

COBB, J.

The plaintiff in error and one Frank Miller were jointly informed against in the district court of Douglas county for burglariously entering a dwelling house and stealing therefrom a quantity of silverware. Miller pleaded guilty; White pleaded not guilty, was tried and convicted. He presented a motion for a new trial, which was overruled. Immediately thereafter, and before sentence, he presented a motion in arrest of judgment, which was overruled, and he was thereupon sentenced to punishment in the state's prison.

The following are the grounds stated in the last named motion:

"1. That the county attorney who filed the information had no legal authority to inquire into the offense alleged in this court, for the reason of its not being within the jurisdiction of the court.

"2. That no information was ever filed against this defendant, and preliminary examination had thereon by some magistrate or competent authority, and there has been no indictment or presentment of this defendant by any grand jury.

"3. That the only pretense there has ever been of giving this defendant a preliminary examination was for another and different crime than that for which the county attorney has informed against him, and on which he was tried in this court and in this case.

"4. That he never was informed against and had any preliminary examination for or on the charge upon which the state has assumed to put him on trial in this court, nor was he ever presented to this court on such charge by any grand jury.

"5. That he has been, and by the proceedings in this case is sought to be, deprived of his liberty without due process of law."

To the overruling of said motion the said Charles White excepted and brings the cause to this court on error.

The plaintiff in error assigns twenty-seven errors. They will not be set out here, but such of them only as it may be deemed necessary to discuss will be stated as we proceed.

It appears from the record that on the 12th day of June, 1888, one Duff Green, who otherwise appears to have been a policeman, made a complaint before the police judge of the city of Omaha against one Frank Miller for grand larceny, in stealing, taking, and carrying away from the premises, 818 Park Place, in the city of Omaha, certain silverware, describing it, of the value of \$94, the property of E. J. Lalk. The name of Charles White does not appear in the charging part of this complaint, but, contrary to the usual form, just below the venue there was a title in which the name "Charles White" does appear after that of "Frank Miller, alias Frank Wilson." The appearance of the name of plaintiff in error upon the paper in that manner has, as I conceive, no legal significance. It also appears that a joint warrant was issued by the said police judge for the arrest of Frank Miller, alias Frank Wilson, and Charles White; that they were brought before the police judge, whereupon Wilson waived an examination

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and White was examined and committed. Afterwards, on the 15th day of June next thereafter, the county attorney of said county presented a joint information in the district court against the said Frank Miller, alias Frank Wilson, and Charles White for burglary and larceny, in breaking and entering, in the day time, the dwelling house of E. J. Lalk with intent to steal, etc., and stealing certain articles of silverware, in said information described, of the value of \$94. The plaintiff in error raised the question of the jurisdiction of the district court to sentence him to punishment for the felony for which he was tried by his motion in arrest.

Section 493 of the Criminal Code provides that "A motion in arrest of judgment may be granted for either of the following causes: First—That the grand jury, which found the indictment, had no legal authority to inquire into the offense charged by reason of its not being within the jurisdiction of the court," etc.

At the time of the adoption of the Code containing the section above in part quoted there was but one method of bringing a criminal action of the grade of felony within the power and jurisdiction of a court for trial and the punishment of an offender; that was by indictment by a grand jury. Then, although, as now, the law provided for the making of a complaint before a magistrate against persons accused of crime, for the arrest of such persons, the bringing of them before such magistrate or some other magistrate of the county, and for the examination and holding to bail, or committing of such accused person; yet such proceedings were not, in a strictly legal sense, a necessary part of the prosecution of such person for the crime; but a grand jury could, and still can, for that matter, without regard to previous charge, arrest on examination, receive and act upon original charges made by one of their own number, or any other person who may desire to come before them for that purpose, against any person, and upon suffi-

cient proof find and present an indictment, and upon the arraignment of the person thus indicted, except in cases where the person indicted has been brought within its jurisdiction, by virtue of extradition proceedings, from a foreign state or country, will not inquire into the regularity of any proceeding in reference to such accused person antecedent to the finding and presentation of the indictment; or, perhaps, I should also except the legality and regularity of the organization of the grand jury itself.

The act of March 9, 1885, gave to the several courts of this state jurisdiction to hear, try, and determine prosecutions upon informations for crimes, misdemeanors, and offenses. Section 8 of said act provides that "no information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor, as provided by law, before a justice of the peace or other examining magistrate or officer, unless such person shall waive his right to such examination," with a proviso that such limitations shall not apply to fugitives from justice. Here is an important departure from the course of procedure in prosecutions for criminal offenses. Formerly, as we have seen, it was the indictment that gave jurisdiction of the offense—in the sense in which we are now speaking of it—to the court to try the offender. Now, in proceeding under the said act, it is the information for such offense, and the "preliminary examination therefor, as provided by law," that gives the court "the same power and jurisdiction to hear, try, and determine that it possesses when proceeding upon an indictment." It therefore becomes necessary to determine what is provided by law in respect to the preliminary examination of persons for offenses.

Section 283 of the Criminal Code provides that "every sheriff, deputy sheriff, constable, marshal, or deputy marshal, watchman, or police officer shall arrest and detain any person found violating any law of this state, or any legal ordinance of any city or incorporated village, until a war-

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rant can be obtained." Section 284 provides that "Any person not an officer may, without warrant, arrest any person if a petit larceny or a felony has been committed, and there has been reasonable ground to believe the person arrested guilty of such offense, and may detain him until a legal warrant can be obtained." Section 285 provides that "justices of the peace, mayors of cities and villages, police judges and probate judges shall have power to issue process for the apprehension of any person charged with a criminal offense," and section 286 provides that "Whenever a complaint in writing and upon oath, signed by the complainant, shall be filed with the magistrate, charging any person with the commission of an offense against the laws of this state, it shall be the duty of such magistrate to issue a warrant for the arrest of the person accused if he shall have reasonable grounds to believe that the offense charged has been committed." The succeeding eight sections are devoted to provisions for the giving of security for costs, the contents of the warrant, its execution, the detention of the prisoner in jail, the bringing of him before the proper magistrate, and other details. Section 295 provides that "when any offense is committed in view of any magistrate, he may, by verbal direction to any sheriff or constable, or marshal or other proper officer, or, if no such officer be present, then to any citizen, cause the offender to be arrested and kept in custody for the space of one hour, unless he shall sooner be taken from such custody, by virtue of a warrant issued on complaint under oath; but a person so arrested shall not be confined in jail nor put upon trial until arrested upon such a warrant." The "legal warrant" thus spoken of in the 283d and 284th sections, and the "warrant" spoken of in the 295th section, is the same as the process provided for by section 285, and which can only be issued against persons charged, upon oath, with the commission of such offenses. Such charge, or complaint as it is usually called, is that which gives the magistrate

jurisdiction of the offense, and to make a preliminary examination of the offender. And no person against whom no such charge has been made can, in contemplation of law, be said to "have had a preliminary examination therefor as provided by law."

We have seen that under the statute of 1885 an information gives the district court the same jurisdiction of an offense and to try and punish the offender that an indictment does; but unlike an indictment the information depends for its legal existence upon a preliminary examination of the offender, and this examination must have been "as provided by law." The law, as we have seen, provides, as a necessary and indispensable part of or antecedent to such examination, that the accused should have been charged upon oath with the commission of the offense.

The statute of Michigan providing for the arrest and examination of offenders and the taking of bail is somewhat more comprehensive than our own. It makes it the duty of the magistrate taking an examination to take down in writing the depositions of the witnesses, but does not, in terms, require the magistrate upon the examination to cause the depositions of the witnesses as taken down by him to be read over to them before signing; but, as was said by the court in the case hereafter cited, "Such is the common practice and should be required."

The case of *People v. Chapman*, 62 Mich., 280, came before the supreme court of that state in 1886. Chapman had been tried and convicted upon information of a most heinous and revolting crime, and brought the case upon error. The supreme court in the opinion, after ruling every point arising upon the merits against the accused and showing that he was guilty beyond a peradventure, says (p. 288): "A serious difficulty arises, however, when we consider the manner of the preliminary examination of the accused upon which he was held to trial in the circuit.

"It appears, without any contradiction, that during the

examination of the respondent, and at its close, before Irving T. Wood, a justice of the peace, residing in Brownstown, the depositions of the witnesses were not subscribed by them. The depositions so taken by the justice were returned by him to the circuit court without signing by the witnesses or reading of their testimony to them. The examination closed January 15, 1884, and the return was filed in the county clerk's office January 24, 1884. The defect was discovered by the prosecuting attorney some time in March 1884, when the depositions were taken by the sheriff to the justice and some of the witnesses seen at their homes and other places and their signatures procured to their depositions, but without reading their testimony or having it read to them. The justice attached his jurat certifying that the same was sworn to and subscribed on the 15th day of January, 1884. No oath was administered to any of them at the time of signing. * * * During the trial, upon a showing of the facts above stated, the defendant's counsel moved to quash the information upon the ground that there had been no preliminary examination as required by statute and no waiver of the same. * * * The information was not filed in this cause until after the depositions had been signed by the witnesses and returned to the clerk's office by the justice. In this only does it differ from *People v. Smith*, 25 [Mich., 497]. In that case the depositions were unsigned when the information was filed, and at the time of trial and conviction of the accused. The statute does not, in express terms, require the depositions taken down by the magistrate upon the examination to be read over to the witnesses before signing, but such is the common practice, and should be required. (How. Stats., sec. 9469.)

"If the language of the witness, as taken by the magistrate, is not read to the witness, or by him before signing, for the purpose of correction, there can be no certainty that the deposition of the witness so written and signed is as it was actually stated under oath. * * *

"But besides this the defect is radical in this case. The defendant was held to trial without any preliminary examinations under the statute. We do not mean to hold that the neglect to have one or more witnesses sign their depositions would void an examination, provided there was sufficient testimony to bind him over from witnesses who had subscribed their depositions. But here Chapman could not have been held if the testimony of his wife had been expunged from the record. * * * Nor do we think, after the justice had made his return, in January, to the circuit, that he was authorized to procure the signatures of the witnesses in March afterwards. * * * It follows that the conviction must be set aside and the respondent discharged from custody."

Upon the question of jurisdiction the case at bar is a far stronger one than the above. There the want of jurisdiction in the circuit court, to try and punish Chapman upon the information, arose out of a mere irregularity in the preliminary examination; for that reason he had not had a preliminary examination, according to law. But here no magistrate has ever had jurisdiction to give White a preliminary examination, for the reason that he has never been charged on oath with the commission of an offense, and without that, as we have seen, no legal process could be issued against him, nor could he be placed upon trial, preliminary or final. The conviction, therefore, cannot stand. I do not think, however, that it follows that the accused must necessarily be discharged from custody. If the authorities of Douglas county claim the right to take him back there, and a complaint under oath is made against him before a magistrate for the commission of the offense, I see no reason why they may not do so.

The judgment of the district court is reversed and the case remanded.

REVERSED AND REMANDED.

THE other judges concur.

28	350
45	507
28	350
54	395
28	350
158	107

GUY C. BARTON ET AL., APPELLANTS, V. UNION
CATTLE COMPANY, APPELLEE.

[FILED DECEMBER 31, 1899.]

Waters: POLLUTION: INJUNCTION. Plaintiffs are the owners of a tract of land through which the Papillion creek flows, and which land is used for general farming purposes and for stock raising, watering their cattle from the creek. The defendant owns a larger tract of land immediately adjoining, up the stream from the plaintiffs. The defendant erected a large feeding stable for cattle, in which were kept and fed a maximum of 3,750 head of cattle. The barn was washed out by means of steam pumps twice daily, and the dung, urine, and droppings from the cattle carried by means of sewers into the creek, and by force of the stream, down to and upon the plaintiffs' land, thereby fouling and polluting the water and rendering it unfit for use, creating an atmospheric stench and nuisance. This was continued for about two years. In an action in equity by the plaintiffs against the defendants, *held*, that the defendants would be enjoined from continuing such nuisance.

APPEAL from the district court for Sarpy county.
Heard below before DOANE, J.

Hall & McCulloch, for appellants:

An injunction in a case of this kind will not be refused because the damage is slight, or because it entails expense and inconvenience to the aggressors. (*Stockport Water Works v. Potter*, 7 H. & N. [Eng.], 160; *Clowes v. Staffordshire Potteries Co.*, L. R. 8 Ch. App., 125; *Goodson v. Richardson*, 9 Id., 224; *Wilts v. Swindon Water Works Co.*, 9 Ch. App., 451.) The pollution of streams cannot be adequately compensated for by damages. (*Tuolumne Water Co. v. Chapman*, 8 Cal., 392; *Holsman v. Boiling Springs Bleaching Co.*, 14 N. J. Eq., 346; *Atty. Gen. v. Steward*, 5 C. E. Green [N. J.], 417; *Davis v. Lambertson*, 56 Barb. [N. Y.], 480; *Corning v. Troy Factory*,

40 N. Y., 191; *Lyon v. McLaughlin*, 32 Vt., 423; *Silver Springs Co. v. Wauskuck Co.*, 13 R. I., 611; Gould on Waters, sec. 545; *Bealy v. Shaw*, 6 East [Eng.], 208; *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D., 769.) Injunction is the proper remedy for injuring a stream by discharging sewerage therein. (*Holt v. Rochdale*, L. R. 10 Eq., 354; *Atty. Gen. v. Cockermouth*, 18 Id., 172; *Same v. Hackney Board*, 20 Id., 626; *Goldsmith v. Tunbridge*, L. R. 1 Ch. App., 349.) Lapse of time will not prevent injunction unless prescription has been established, which cannot be claimed here. (*Stein v. Burden*, 24 Ala., 130; *Polly v. McCall*, 37 Id., 30; *Crosby v. Bessey*, 49 Me., 539; *Campbell v. Seaman*, 63 N. Y., 582; *Flight v. Thomas*, 10 Ad. & El. [Eng.], 590; *Crossley v. Lightowler*, L. R. 3 Eq. Cas., 279.)

J. M. Woolworth, for appellee:

A riparian proprietor may make a reasonable and legitimate use of the water, even though it is thereby reduced in amount or damaged in quality. (*Haskins v. Haskins*, 9 Gray [Mass.], 390; *Gould v. Boston Duck Co.*, 13 Id., 442; *Prentice v. Geiger*, 74 N. Y., 341; *Snow v. Parsons*, 28 Vt., 459.) Reasonable use is a question of fact: this fact was found by the court below, there was abundant evidence to support it, and the judgment should not be reversed. (Cases *supra*; *Hayes v. Waldron*, 44 N. H., 580; *Merritt v. Brinkerhoff*, 17 Johns. [N. Y.], 306; *O'Riley v. McChesney*, 49 N. Y., 372.) The true test of the right to foul water is the naturalness of the use. In this case the use was a natural one, and the waters were not fouled by substances from beyond the premises. (*Losee v. Buchanan*, 51 N. Y., 477; *Penn. Coal Co. v. Sanderson*, 94 Pa. St., 302.) The industry is one of considerable public importance, and should not be suppressed for the sake of a slight advantage to plaintiffs. (*Richard's Appeal*, 57 Pa. St., 105; *Penn. Coal Co. v. Sanderson*, *supra*; *Atchison v. Peterson*, 20

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Wall. [U. S.], 507.) Appellants having by their silence acquiesced in the improvements made and expenses incurred by appellee, should now be left to their action for damages. (*Atty. Gen. v. Sheffield Gas Co.*, 3 DeG., M. & G. [Eng.], 304; *Tash v. Adams*, 10 Cush. [Mass.], 252; *Bassett v. Salisbury Mfg Co.*, 47 N. H., 426, 439; *Pomerooy*, Eq. Jur., 817.)

COBB, J.

This cause was appealed from the judgment of the district court of the county of Sarpy, which dissolved the injunction against the defendant and dismissed the action of the plaintiffs.

The suit was brought to restrain the defendant from polluting the waters and injuring the flow of the current of Papillion creek, by discharging into it the manure and offal from the extensive cattle-feeding barns maintained by the defendant, in such manner and degree as to injure the stream for husbandry, and destroy it for watering live stock on the adjacent premises of the plaintiffs.

The facts appear, that in 1885 the plaintiffs bought two parcels of land lying on said stream; the one of 80 acres was originally pre-empted by Gilmore, and was bought of one Frost, by which names it is designated; the other, of 160 acres, was bought of Gates, after whom it is called, both lying on the creek below the defendant's lands and barns. In the same year, the defendant bought 400 acres of land on the creek, adjacent and above the lands of plaintiffs, for feeding-barns and grounds for its cattle. The barns are alleged to provide stalls for 3,500 cattle, each animal having a small separate stall, ranged in rows, heads and tails, in uniformity, with aisles for feeding between head rows, and the like between tails for carrying away manure and offal—the droppings falling into a trough to be carried off by a flow of water in quantities, two or three times daily, and thus conveyed to a sewer through

which it is carried on into the stream, amounting to 1,000,000 gallons daily. By this method, it is claimed by the plaintiffs, the water of the stream is disturbed and polluted, rendered foul for all common uses, and impregnated with noxious exhalations, destructive to husbandry, and dangerous to health. The plaintiffs ask that the judgment below be reversed, that the injunction against the defendant be restored and continued, remedying the injuries complained of, and for general relief.

The answer of the defendant admits the location of the land and property of either party on Papillion creek, in Sarpy county, as alleged; and admits maintaining the cattle barns in the manner stated; and sets up that the plaintiffs had notice and full knowledge of the manner and results of defendant's business prior to establishing it, and consented thereto, and therefore have no cause of complaint.

Upon the trial, the allegations of the petition as to the ownership and occupation of the property constituting the plaintiffs riparian proprietors of a portion of the small stream called the Papillion, in Sarpy county, were fully proved and that they owned and occupied said property on either side of said stream for general farming and cattle raising purposes. The allegations of the petition as to the occupation of a large tract of land upon said stream, immediately above and adjoining the land of the plaintiffs, by the defendant company, and the use of it by said defendant in the manner and for the purpose as set out in the plaintiffs' petition, was also fully proved. The nature, character, and extent of the damage and injury to the plaintiffs, caused by the use of the defendant's feeding barn, and the casting of the manure and urine of their cattle, and other foul and deleterious substances therefrom, into the said stream, and such substances mixing with the water of said stream and floating down to and upon the land of plaintiffs, was also proved. I shall not deem it

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necessary to set out specifically the dates of the acquisition of their several rights in their respective properties upon said stream, by the parties plaintiffs and defendant, as upon a careful examination of the evidence applicable to that branch of the case it does not appear that either party has acquired any prescriptive rights or been guilty of laches which can be urged against them in the case.

While from the evidence it may be deemed probable that the nuisance to the plaintiffs' land, by the defilement of the water of the creek, was aggravated by the discharge of premature calves, or, as one of the defendant's witnesses calls them, "slumps or deacons," therein, along with the ordinary dung and urine from the cattle, during a portion of the time covered by the pleadings, to an extent not to be apprehended generally in the future, yet it appears from the evidence that the method used by the defendant of using warm or heated feed tends to cause cows to prematurely drop their calves; and where large numbers of them are kept together and fed in that manner, an entire cessation of that source of defilement is scarcely to be expected. But aside from this, it is fully established by the evidence that the maintenance of defendant's feed stable in the manner contemplated by its owner, and those skilled in that method of feeding cattle, and operated strictly in accordance with the rules and requirements of the system adopted, contemplates and will inevitably cause the destruction of the stream below so far as its value to the plaintiffs is concerned, and for the use and purpose for which it has heretofore been deemed most useful and valuable.

Considerable evidence, as well as discussion, on the part of defendant, is devoted to the proposition that the injury complained of is trifling, and it is sought to show that plaintiffs may provide means of watering their stock without resorting to Papillion creek, by the outlay of a few hundred dollars and an annual expenditure of twenty per

cent of the original cost. To this point defendant cites the case of *Jacobs v. Allard*, 42 Vt., 33. In that case plaintiffs were the owners and operators of a starch mill propelled by water; defendant was the owner of a shingle mill on the same stream above. The cause of action was "that the defendant, with the intent and design to injure the orators and damage and hinder them from the use of the water for the purpose of their starch factory, threw into the stream the sawdust and shavings and waste from the shingle mill, * * * and that they render the water impure and unfit for making starch, and clog the penstock and prevent the use of the starch factory," etc. The court, in the opinion, say: "The evidence makes a strong impression on our minds that much of the trouble which the plaintiffs claim, and give evidence to show that they experience in the condition of the water as it comes to their works, is attributable to the manner in which they have constructed and adjusted a new dam, in reference to their works, and to the lack of proper fenders and strainers to protect against impurities that may get into the stream from the mills and works above the plaintiffs'. It would seem that by modes and means which they could, without unreasonable pains and expense, have adopted and put in use, they could have secured themselves from the troubles complained of, while the defendant was using his shingle mill and letting the sawdust and waste from it go into the stream."

The distinction between the above case and the case at bar, in respect to the remedy suggested, is that in the one case it is a prevention of the effect of the pollution, and in the other it contemplates the enduring of the effect of the pollution of the stream, but suggests the creation of an artificial water-course to supply plaintiffs' land, and contemplates the abandonment of the stream which is the subject of the litigation. The difference, as it seems to me, is radical in principle; and I do not think that the com-

paratively small cost at which plaintiffs might be able to supply water for their cattle from an independent source can be considered in connection with their right to have the stream remain uncontaminated, in the manner shown by the pleadings and bill of exceptions.

I cannot agree with defendant in the assertion in the brief under the second point, that "The waters of the Papillion, before the building of the defendant's barn, were unfit for cattle." I do not so understand the evidence. While it was doubtless inferior in sparkling clearness to the waters of streams of mountainous regions, where the soil is poor, consisting in great part of sand and gravel, the evidence, as a whole, fails to distinguish it from the general run of Nebraska streams of about the same size, in respect to the clearness and salubrity of its waters and the height of its banks and firmness of its bottom. That it has been used by the inhabitants of the country along its banks, for the purposes of stock water, since the first settlement of the territory, is sufficiently established by the evidence.

Defendant, in the brief, under the third point, uses the following language: "We admit the general rule that the proprietor above must so use the water as not to impair the enjoyment of it by the proprietor below, and therefore must not pollute it. But that general rule is subject to a qualification inherent in the nature of the subject and the relative rights of the parties." The rule is stated in nearly the same language by Judge MAXWELL, in the article on Injunctions, 10 Am. and Eng. Enc. of Law, 844: "Every owner of land through which a stream of water flows is entitled to the use and enjoyment of the water, and to have the same flow in its natural and accustomed course, without obstruction, diversion, or pollution. The right extends to the quality as well as the quantity of water. If, therefore, an adjoining proprietor corrupts the water, an action will lie against him." And this is the law substantially as

laid down in the cases there cited, especially *Holsman v. Boiling Spring Bleaching Co.*, 14 New Jersey Eq., 335; *Richmond Mfg. Co. v. Atlantic D. Co.*, 10 R. I., 106; *Gardner v. Trustees, etc.*, 2 Johns. Chan., 161; *The Mayor, etc., of Baltimore v. Warren Mfg. Co. et al.*, 59 Md., 96.

These cases are authority for the plaintiffs, in the case at bar, as to all its branches. In most or all of them it was held that an injunction would be granted without regard to the magnitude of the interest enjoined.

It is true, as stated by defendant in the brief, that no complaint is made that the defendant's barns were improperly built or negligently managed. Nor can it be denied that the defendant's business might be legitimately carried on, without damage to adjoining land owners, upon a stream of the size of the Missouri or the Platte, but it is manifest from the evidence that it cannot, in the magnitude described in the evidence, be carried on without infringing upon the rights of the lower land owners, upon a stream of the size of the Papillion.

I do not deem it necessary to discuss the question whether the plaintiffs have a remedy by action at law; for I understand it to be settled by the authority of the cases cited, as well as many others, that a continuing nuisance, by polluting the waters of a stream, and others of a like character, may be proceeded against either at law or in equity, at the election of an injured party. (See also *Webb v. The Portland Mfg. Co.*, 3 Sum. [U. S. C. C.], 189; Angell on Water Courses, sec. 444, and cases there cited; *Atty. Gen. v. Steward*, 20 N. J. Eq., 415; *Lyon v. McLaughlin*, 33 Vt., 423.)

The injury complained of by the plaintiffs is the pollution of the water-course, and not the improper or unreasonable use of the water of the stream by the defendant. This is a question of fact, and as the decree of the district court was for the defendant, it must be presumed that it found that there was no pollution of the

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stream; but such finding is unsustained by the evidence as contained in the bill of exceptions, and is clearly against it.

The decree of the district court is reversed, and a decree for the plaintiffs, as prayed, will be entered in this court.

JUDGMENT ACCORDINGLY.

THE other judges concur.

JOSEPH T. MURTAGH V. HENRY THOMPSON ET AL.

[FILED DECEMBER 31, 1889.]

Interest: MAY BE RECOVERED ON COUPONS. A gave a promissory note for \$1,200, due in five years, secured by mortgage with interest at seven per cent, to B. Five coupon interest notes were given, each for \$84, to draw interest at ten per cent from the time they became due. In an action to foreclose the mortgage, *held*, that as the parties could agree upon any rate of interest not exceeding ten per cent, and as the interest on the coupons, together with the interest on the principal debt to the time it became due, did not exceed ten per cent, interest on the coupons could be recovered.

ERROR to the district court for Fillmore county. Tried below before MORRIS, J.

Tibbetts & Morey, for appellant.

No appearance *contra*.

MAXWELL, J.

This is an action to foreclose a mortgage upon real estate, and on the trial a decree was rendered for \$1,452, from which an appeal is taken. It appears from the petition that on the

28	358
48	607
28	358
55	259

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1st day of June, 1882, Henry Thompson and Lucy Thompson, his wife, executed a promissory note for \$1,200, due in five years from date, with interest at seven per cent. At the same time they executed five coupon notes, each for \$84, for the interest on said debt, each of said coupons to draw interest from maturity at ten per cent. The principal question in this court is the right to collect interest on the coupon notes. Our statute authorizes the parties to contract for any rate of interest they see fit not exceeding ten per cent. The interest on the principal in the case at bar is but seven per cent, or \$84 per year. The interest on the coupon notes at ten per cent from the time they matured until the principal debt became due would, when added to the interest on the principal, be less than ten per cent upon the principal sum. Such interest may be collected therefor. It is only where the rate agreed upon, together with the interest on the coupons, will exceed the limit fixed by statute that the contract is prohibited, and such excessive interest cannot be recovered. (*Matthews v. Toogood*, 25 Neb., 536.) The prohibition does not apply in this case. The decree will be modified to conform to this opinion.

JUDGMENT ACCORDINGLY.

THE other judges concur.

28	359
30	536

LOUIS SCHIELDS V. JOHN A. HORBACH ET AL.

[FILED DECEMBER 31, 1889.]

Real Estate: OPTION: LEASE. In 1864 one H. leased for three years three and one-fifth acres of land in O. to S. at a yearly rental of \$35, with the right to purchase for \$1,600. S. thereupon took possession and erected two houses thereon, one for his own family and one for his foreman. He then removed his

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family into one of said houses and has resided there ever since. In 1873 a new lease was made by H. as executor, and also a "proposition to S. to purchase said premises" for \$1,946, with twelve per cent interest, "and what may be found due for taxes paid by me for 1864, '65, '66, '67, '68, '69, '70, '71, and interest at twelve per cent," and stating that "this proposition is made to enable S. to acquire title to said premises as a homestead, and this option to purchase shall continue during the lease he now holds," etc. A large amount of credits and moneys was paid by S. to H. on prior indebtedness, apparently on the contract. In 1878 a new lease was executed by H. as executor, under which S. continued in possession. *Held*, That the proposition to purchase remained open to S. to be accepted at any time during the existence of his lease, and that the lease of 1878 was in effect but a continuation of that of 1873 and 1864, and that S., on payment of the amount due on the purchase, with twelve per cent interest, together with the amount of taxes with twelve per cent interest thereon, was entitled to a conveyance.

APPEAL from the district court for Douglas county.
Heard below before WAKELEY, J.

John W. Lytle and *P. O. Hawes*, for appellant, cited: *Smith v. Gibson*, 25 Neb., 511; *Blunt v. Tomlin*, 27 Ill., 93; *Perkins v. Hadsell*, 50 Id., 216; *Edwards v. Fry*, 9 Kas., 417; *Brown v. Jones*, 46 Barb. [N. Y.], 400; *Fry*, Spec. Perf., sec. 292; *Pomeroy*, Id., sec. 123; *Waterman*, Id., sec. 483.

A. N. Ferguson (*George B. Lake*, of counsel), for appellees, cited: *Seymour v. Street*, 5 Neb., 85; *Cheney v. Eberhardt*, 8 Id., 423; *Hartley v. Dorr*, 15 Id., 451; *Savage v. Pellon*, 17 Id., 144; *Sang v. Beers*, 20 Id., 365; *Manning v. Cunningham*, 21 Id., 288.

MAXWELL, J.

This is an action to enforce the specific performance of an alleged contract for the sale of real estate.

On the trial of the cause in the court below, judgment

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was rendered in favor of the defendant and the action dismissed.

The testimony shows that in the year 1864 Schields and Horbach entered into a contract as follows:

"MEMORANDA OF TRANSACTION BETWEEN J. A.

HORBACH AND LEW SCHIELDS.

"1864, January 1.—J. A. Horbach leased to Lew Schields for three years, at an annual rental of \$35 per year, and Schields to pay all taxes assessed on said premises during lease.

"1864, May 20.—Contracted with Lew Schields to do brick and stone work and plastering on dwelling house at specified prices in written contract, to be completed and settled for October 1, 1864, and at same time bargained to sell him the premises leased, \$700 of the price of same to be credited on his work at that date, and balance, \$900, to be settled for with his note due one year from October 1, 1864, with ten per cent, and after due at twelve per cent until paid.

"Said Schields failed to complete at the time, and no part of same being paid or credited him, settlement was made in 1865, and he retained possession of premises under his old lease extended to present time, but failed to pay lease or taxes. In 1869 and 1870, and prior to those years, Schields became indebted to said Horbach for lime, plaster, hair, and cement, for which he settled by notes, all of which remain unpaid, and on the 14th day of January, A. D. 1873, full settlement being made, there is found to be due on account, merchandise, and interest, \$383.05, for which said Schields gives his note due one day after date with interest at twelve per cent, and all leases and contracts being canceled and settled, a new lease is given to said Schields for one year to occupy said premises for cultivation and dwelling for the consideration of \$50, and taxes for 1873. This making a full and final settlement of all

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claims and demands due between said Schields and Horbach up to this date.

"Signed by the parties this date, January 14, 1873.

"J. A. HORBACH.

"LOUIS SCHIELDS.

"In presence of

"WM. J. KENNEDY."

This statement evidently was drawn up and signed on the 14th of January, 1873, and is valuable as showing the true nature of the transaction between the parties and what had been done under it. On the same day a new lease was drawn up, signed, and acknowledged, as follows:

"This lease, made and entered into this 14th day of January, A. D. 1873, by and between J. A. Horbach, of Omaha, Nebraska, of the first part, and Lew Schields, of Omaha, Nebraska, of the second part,

"Witnesseth, that the said party of the first part, in consideration of the rents, covenants, and agreements hereinafter contained, to be paid, kept, and performed by said party of the second part, hath demised, leased, and let, and by these presents doth demise, lease, and let, unto the said party of the second part that certain piece of ground embraced in the enclosure known as Schields' brick yard, containing about three acres and one-fifth of ground, in the southwest quarter of section 15, township 15 north, range 13 east, and lying west of the center of Twenty-first street, in Omaha, being the same premises as leased to said Schields for brick yard purposes, on that 1st day of January, A. D. 1864, for the term of three years and continued to this date and canceled.

"The said lessee shall have the right, at the expiration of said term, to remove all buildings by him placed on said premises, *only on* condition that he will pay the rent and fully perform all the covenants and agreements hereinafter contained, and that he shall have fully paid his note of \$383.05 of January 14, 1873.

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"To have and to hold the same unto the said lessee for the term aforesaid, and the said Louis Schiels, in consideration of the leasing aforesaid, doth hereby agree to pay as rent for said premises the sum of \$50 for the term of one year from this date, at which time this lease will terminate, and the said rent to be paid during the term of this lease in the following manner, viz.: \$25 on or before the 14th of January, A. D. 1873, and \$25 on or before the 14th day of November, A. D. 1873.

"The right to remove buildings from said premises at the termination of this lease is intended also to cover the one-story dwelling erected thereon by said Schiels under his former lease, and all improvements or machinery pertaining to his brick yard, excepting that no right is given to remove any part of the fencing around said enclosure.

"The said party of the second part further agrees to pay all taxes and assessments of every kind that may be levied or assessed on said premises during the term above granted, and that at the expiration of said term, or at any earlier termination of this lease, in case it should be sooner terminated, he will quietly and peaceably yield up possession of said premises unto J. A. Horbach, his agent, attorney, or assigns, in as good condition as the same were when entered upon.

"And it is further expressly agreed and understood by and between the parties hereto, that in case the rent above reserved, or any part thereof, be not paid at the time the same becomes due and payable, or if any other condition or agreement herein contained on the part or behalf of the said Louis Schiels be not by him fully complied with and performed, then and in that case the said J. A. Horbach, his agent, attorney, or assigns, as aforesaid, shall have the right, at his or their option, to declare this lease at an end, and thereby cancel and annul the same, and to retake immediate possession of said premises, and to

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put out and remove any person or persons occupying the same.

"J. A. HORBACH.

"LOUIS SCHIELDS.

"In presence of

"WM. J. KENNEDY.

"January 16, 1873."

On the same day, viz., January 15, 1873, the following proposition was duly signed and delivered by Horbach to Schields:

"OMAHA, January 15, 1873.

"Having settled up all claims with Lew Schields to date, I now make him this proposition to purchase said premises of three and one-fifth acres: If said Schields will pay up his note of January 14, for \$383.05 and interest on same, in full within six months from date, I will sell him the premises leased to him January 14, 1873, for \$1,946 with twelve per cent interest from this date, and the additional price or sum of what may be found due me for taxes paid by me for 1864, '65, '66, '67, '68, '69, '70, '71, and 1872, and interest at twelve per cent on such amounts from date they were paid by me.

"This proposition is made to enable Schields to acquire title to said premises as a homestead, and his option to purchase shall continue during the lease he now holds, *provided one half of the same shall* be paid up during 1873 and the balance during 1874 with interest.

"J. A. HORBACH."

The note referred to in this memorandum, for \$383.05, was not paid in six months, but it was paid in full in 1874 and 1875 and payment thereof accepted by Horbach.

In 1878 a third lease was executed by Horbach as follows:

"This lease, made and entered into this 14th day of January, A. D. 1878, by and between J. A. Horbach, executor of the estate of A. Horbach, deceased, of the first

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part, and Lew Schields, of Omaha, Nebraska, of second part,

"Witnesseth, that the said party of the first part, in consideration of the rents, covenants, and agreements hereinafter contained, to be paid, kept, and performed by the party of the second part, doth demise, lease, and let unto the said party of the second part, the tract of land known as the Schields brick yard, comprising three and one-fifth acres, more or less, in the southwest quarter of the northwest quarter of section 15, town 15 north, range 13 east, for the term of three years, at an annual rental of \$50 per year and taxes, payable annually before the expiration of each year.

"To have and to hold the same unto the said lessee for the term aforesaid.

"And the said Lew Schields, in consideration of the leasing aforesaid, doth hereby agree to pay as rent for said premises, the sum of \$50 annually on or before January 14, each year, viz., January 14, 1879, 1880, and 1881, at the office of J. A. Horbach, in the city of Omaha; and it is mutually agreed between said Schields and said J. A. Horbach that if said lease money is paid when due, he shall have the right to remove his dwelling house now on said premises and so placed there under former lease with said Horbach.

"It is further agreed that said Schields shall not make brick on said premises without the consent of said party of first part, and said Lew Schields further agrees that at the expiration of the term above granted, or at any earlier termination of this lease in case it should be sooner terminated, he will quietly and peaceably yield up possession of said premises unto said J. A. Horbach, executor, or his legal representatives, in as good condition as the same were when entered upon.

"And it is further expressly agreed and understood by and between the parties hereto, that in case the rent above

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reserved, or any part thereof, be not paid at the time the same becomes due and payable, or if any other condition or agreement herein contained on the part or behalf of the said Lew Schields be not by him fully complied with and performed, then and in that case the said J. A. Horbach, executor, or his agent, shall have the right at their option to declare this lease at an end, and thereby cancel and annul the same, and to retake immediate possession of the said premises, and to put out and remove any person occupying the same.

"It is understood that the covenants and agreements in this lease shall succeed to and be binding upon the respective heirs, executors, administrators, and assigns of the parties hereto.

J. A. HORBACH,

Ex'r of Estate of A. Horbach, Dec'd.

"LOUIS SCHIELDS.

"In presence of

"J. BUDD."

There is a receipt of Horbach to Schields in the record as follows:

"Received on settlement of Lewis Schields, March 3, 1875, after paying his note and interest from January 17, 1874: By balance of \$110 pd. to K. Feb'y 1, '75, and bill of work, \$94.35, in 1874. The sum of \$123.20 to his credit; also, received of him to collect note \$25 E. C. Erfling, and also a second note \$25 of E. C. Erfling and order on Shropshire to collect \$55.23; also hold assigned to W. I. Kennedy to collect judgment against E. Creighton and Unitarian church and mechanic's lien on Union Brewery over \$400 and int. to collect for him and Vandamaker claim.

J. A. HORBACH."

There is also a credit September 30, 1875, in favor of Schields of \$83.55 for labor and material, and a like credit in October, 1875, of \$29.10.

August 24, 1876, the plaintiff is credited on account \$181.35.

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April 15, 1879, he is credited on account \$11.

September 30, 1879, he is also credited on account \$35.

September 30, 1879, to credit, \$35.

December 31, 1879, there is a credit of \$41.10.

June 10, 1882, account of Clemmens, \$86.

December 30, 1884, credit on account, \$46.

The testimony also shows that the defendant collected the Erfling claims, \$50; the Shropshire claim, \$55.23, and \$206.10 of the lien on the brewery, and all or nearly all of the above claims except the Creighton and Vandamaker.

The brewery was burned and a part of that claim thereby lost; but whether this loss was to be borne by the plaintiff or defendant is not clear.

The defendant therefore received in moneys and credits from the plaintiff, after the payment of the note for \$388.05, more than \$900.

Now, to what purpose was this money to be applied? The testimony shows that about January 1, 1864, the plaintiff rented the land in question of the defendant for three years at a yearly rental of \$35, and soon afterwards with the right to purchase the land for \$1,600; that the plaintiff erected two houses on the land, one for himself and one for the foreman of his brickyard; that the plaintiff in April, 1864, moved his family into the house erected for himself and has continued to reside there ever since and it is now his home.

This right to purchase his home was preserved in the arrangement made in January, 1873, and the language of the proposition leads us to infer that the defendant desired him to understand that he was friendly to him and would aid him as far as possible. In effect he says to the plaintiff, I want to enable you to purchase your homestead and I will take \$1,946 with twelve per cent interest from this date, but in addition you must repay me the taxes on said land from 1864 with twelve per cent interest and this right shall continue "during the lease he now holds." It is

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true there were certain conditions attached to this proposition, such as the payment of the note within six months and the payment of one-half of the purchase money in an indefinite time, but these do not seem to be material, as the note was actually paid and the payment thereof accepted and credited, and time is not of the essence of the contract.

In *Morgan v. Bergen*, 3 Neb., 214, it is said: "In equity, in ordinary cases where there is nothing special in the nature of the property or of the purpose for which it was intended to be purchased, although a particular day may be fixed for the completion of a contract, it is considered that the general object being the sale of the estate for a given sum, it is not an indispensable requisite to the granting of relief, that the party seeking it should have performed precisely at the day. If he has not been guilty of gross neglect, if his laches can be reasonably explained and be shown to be consistent with fairness and good faith, a court of equity will still afford relief; but the parties may make *time* the essence of the contract, so that if there be a default at the day, without any just excuse and without any waiver afterwards, the court will not interfere to help the party in default. (*Wells v. Smith*, 7 Paige, 22; *Benedict v. Lynch*, 1 Johns. Ch., 370.)"

It is apparent from the testimony that the plaintiff and defendant had had considerable dealings with each other before the written proposition of 1873, and that such dealings continued to a greater or less extent to 1882.

The parties were well acquainted apparently, and the ordinary mode of payment adopted by the plaintiff was to assign an account for labor or material against some one to the defendant, and such accounts seem to have been accepted by him and if possible collected. It may be said, however, that even if the proposition ran with the lease of 1873, it was terminated on the taking effect of the new lease made in 1878. But why? The same reasons existed in 1878 for the purchase by the plaintiff of the homestead that were

in force in 1873. The principal difference between the 1878 lease and that of 1873 is that that of the later date is executed by the defendant as executor of his father's estate while that of 1873 is executed in his own name. He seems to have had ample authority to execute the leases of 1864, 1873, as well as that of 1878, and there is nothing to show that at the latter date it was the intention of the parties to abandon the proposition to purchase while the credits of the plaintiff held by the defendant at that time show that he is entirely mistaken in his oral testimony as to the condition of the account between them. The proposition of 1873 is to be construed in the light of that of 1864. That was not regarded as terminated by the new lease of 1873, although the evidence of it was then renewed and the price somewhat advanced. The proposition, however, was to the plaintiff to purchase for a certain price if he so elected during the leasehold estate. This under the lease of 1864 evidently was not regarded as terminating at the end of three years; so under the lease of 1873 it evidently continued for years beyond the time expressed therein.

Here was the lessee in possession at a fixed rent with the privilege to purchase at a fixed price at any time during the lease. The property was his home. He evidently is poor, somewhat illiterate, and addicted to the use of intoxicating liquors. He seems to have trusted implicitly in the defendant, and it is evident that the plaintiff intended his payments to be applied on the purchase.

The defendant also seems to have been anxious to make it appear that the payments were not made on the purchase, as the later receipts written by him seek to apply such payments on rent and taxes. This does not aid him, because if there was an outstanding proposition which the plaintiff could accept at any time during the existence of the lease it would not prevent the application of the funds to that purpose if the proposition was accepted, while had there been no proposition still pending, it would have been

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unnecessary to use such language. The inference therefore is against the defendant. The defendant also, according to his own testimony, recognized the fact that the plaintiff had rights in the land as late as 1879 or 1880, by offering to convey a lot to plaintiff's wife if he would move his house thereon. The house was moved, but the plaintiff testifies that the cause for the removal was the fact that a bank of earth was so close to the house as to be in danger of falling down. The exact facts in the matter it is unnecessary to determine. The exact date of the notice to quit given by the defendant to terminate the lease does not appear, but it is evident that the plaintiff before the termination of the lease exercised the right to take the land, and thereupon brought this action to enforce the contract. The case in many of its features resembles that of *Smith v. Gibson*, 25 Neb., 511; in which case it was held that the option to purchase might under the terms of the lease be exercised at any time during its existence. The circumstances are more favorable to the lessee in this case than in that, and the proposition more liberal.

The defendant well knew from the first that the plaintiff had no means to pay for the property in question except those derived from his labor, and that in all probability he would not be paid promptly at the day. This had been his experience under the proposition of 1864, yet he held out encouragement to him to purchase the land, not only in the proposition itself, but by accepting accounts in payment and collecting them. The proposition was to continue as long as the lease continued, and this under the circumstances of the case was not terminated by the lease of 1878. The defendant has received part payment at least for the land and cannot retain this and repudiate the contract. That he has received such part payment there is no doubt from the written evidence before us. The oral testimony of both the plaintiff and defendant is subject to the imperfections of the memory of the witnesses and it is

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evident that both have forgotten or have not stated some of the facts. We have, therefore, placed our decision upon the written evidence in the case, the situation of the parties, and facts which are conceded or not denied. The defendant has amply guarded his rights in the premises by requiring the payment of interest at twelve per cent and the repayment of all taxes with interest at that rate.

The amount due, both on the contract and for taxes with interest, must be paid by the plaintiff before he is entitled to a conveyance.

The amount of taxes due on this particular piece of land does not appear; neither can we determine from the record the exact amount paid by the plaintiff to the defendant.

A reference will therefore be ordered to ascertain both amounts and the amount due the defendant upon the contract with twelve per cent interest, both on the amount due for purchase money and on taxes.

The judgment of the district court is reversed, and upon the payment by the plaintiff to the clerk of this court of the amount found due within six months after the confirmation of the report of the referee the defendant will convey said land to the plaintiff, or in case of his neglect to do so for ten days this decree shall operate as a conveyance.

Rollin M. Strong is hereby appointed referee to take testimony and report to this court within thirty days.

JUDGMENT ACCORDINGLY.

COBB, J., concurs.

REESE, CH. J., dissenting.

Not being able to agree with my associates in the conclusion reached in this case, I will briefly give my reasons for such dissent.

Of the oral evidence submitted to the trial court it was testified in substance by plaintiff that he had practically

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complied with the terms of this last agreement; that he had paid large amounts to defendant, consisting of cash, labor, and the assignments of certain claims which had been collected and appropriated by defendant, until he had complied with the terms in the contract; that it was understood and agreed that all of the payments and transactions between them by which defendant received money were to be applied to the purchase price of the land.

Upon the other hand it was testified by defendant that plaintiff had not complied with the terms of the contract; that the note for \$383.05 was not paid for more than a year after the execution of the contract, and that all payments made by plaintiff to him were expressly made to be applied upon the rent.

Upon every material inquiry in the case, from beginning to end, there was a sharp conflict in the testimony of the two witnesses, that of defendant being supported in many instances by receipts executed by plaintiff, showing upon their face that the money was to be applied to the payment of taxes and rent for the ground in dispute. A large number of these were introduced in evidence, nearly all of which show the appropriation of money in that way by plaintiff.

It is true that plaintiff in his evidence had testified that defendant prepared all these agreements in writing for him to sign; that he signed them in many instances without reading them and without knowing their contents, and that he was not aware at the time the payments were made that defendant claimed to apply in the way in which it is stipulated in the receipt.

Upon the other hand defendant testified positively and directly that many of the receipts were read by plaintiff, and those which were not read by him were read to him, and that he was fully aware of their contents.

The whole matter was peculiarly within the discretion of the district court. The witnesses were before him; he

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saw and heard them testify, and we are unable to say that the finding was unsupported by the evidence.

Assuming that the facts were as stated by defendant, and of this the trial court was the judge, all other questions become immaterial to a decision of the case. Whatever may be the right of action of plaintiff as against defendant for the money had and received by him, if more than the amount actually due, need not be here considered, as he doubtless has a remedy.*

 E. A. BOWEN V. FAYETTE I. FOSS.

28	373
53	592

[FILED DECEMBER 31, 1889.]

Married Women: JOINT CONTRACT: LIABILITY. In an action on a promissory note signed jointly by husband and wife, it was alleged in the petition, in substance, that the note was given for a debt contracted by the wife. This was denied in her answer and she pleaded that she signed the note merely as surety for her husband. A verdict being returned against her for the amount of the note, *held*, that the testimony sustained the verdict.

ERROR to the district court for Saline county. Tried below before MORRIS, J.

Abbott & Abbott, for plaintiff in error:

A married woman is still under disabilities. To charge her separate estate the debt must be contracted for her benefit and on the credit of such estate. (*Yale v. Dederer*, 18 N. Y., 265 [72 Am. Dec., 503]; *Hale v. Christy*, 8 Neb., 264; *Savings Bank v. Scott*, 10 Id., 83; *Barnum v. Young*, Id., 309; *Kan. Mfg. Co. v. Gandy*, 11 Id., 448; *Gillespie v. Smith*, 20 Id., 455.) The note is signed by the hus-

*A rehearing of the case was subsequently granted and the judgment of the court below affirmed October 7, 1890.

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band in the ordinary form, and by the wife as surety; hence, aside from the evidence, the legal presumption is that she is a surety only.

Daves & Foss, contra:

The sole question is one of fact and the jury found that Mrs. Bowen borrowed the money in her name and on the credit of her individual property alone. The status of a married woman with reference to her separate estate is that of a *feme-sole*. (*Webb v. Hoselton*, 4 Neb., 315; *Davis v. Bank*, 5 Id., 245; *Gregory v. Hartley*, 6 Id., 363, and Nebraska cases cited by counsel for plaintiff in error.)

MAXWELL, J.

This action was brought by the defendant in error against the plaintiff in error upon a promissory note as follows:

"\$100.

CRETE, NEB., Nov. 27, 1882.

"On or before the 27th day of November, 1883, for value received in one spring buggy, we promise to pay F. I. Foss, or order, one hundred dollars, with interest at ten per cent from date, payable at State Bank in Crete.

"The express condition of the sale and purchase of the above property is such that the ownership does not pass from said ——— until this note and interest is paid in full; that the said ——— has full power to declare this note due and to take possession of said property at any time that they deem themselves insecure, even before the maturity of this note.

D. BOWEN.

"E. A. BOWEN.

"P. O., De Witt."

On the trial of the cause an amended petition was filed by leave of the court as follows:

"That on the 27th day of November, 1882, said defendants made and executed and delivered to the plaintiff their promissory note for the sum of \$100, bearing ten per cent

interest from date, no part of which has been paid, and there is now due the sum of \$153.33 upon the same, although it has often been demanded.

"And that the said D. Bowen and E. A. Bowen are, and were at the time of making and execution of said note, husband and wife, and that the money for which said note was given was loaned to the said E. A. Bowen by said plaintiff, upon her credit, and it was then and there the intention of all of said parties to charge the separate estate of the said E. A. Bowen with said debt evidenced by said note, the said E. A. Bowen being the principal in said transaction.

"2d. No part thereof has been paid, and there is now due the sum of \$153.33 and costs of suit, for which plaintiff asks judgment, with interest at ten per cent."

To this petition the plaintiff in error filed an answer, in which she alleges, in substance, that she is a married woman living with her husband, D. Bowen, and was such at the time of signing the same; and that she signed said note as surety for her husband.

Upon these issues the case was tried, and the jury returned a verdict in favor of the defendant in error for the amount claimed, and a motion for a new trial having been overruled, judgment was entered on the verdict.

The testimony of the defendant in error tends to show that the indebtedness in question was incurred for a new buggy; that at the time of the purchase the plaintiff in error was in ill health, and could not bear the fatigue of riding in a lumber wagon; that the defendant in error had in his hands for collection certain debts due her in Ohio, amounting to about \$400; that the husband of the plaintiff in error was not in a condition financially to pay the debt, and therefore the credit was not given to him but to his wife.

This testimony is denied by the plaintiff in error and her husband, but we find no denial of the charge, in sub-

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stance, that the husband had no means to pay a debt of this kind. This, we think, is a material circumstance in the case, in considering to whom the credit was given, as Mr. Foss testifies that he knew that the wife was abundantly able, while the husband was not. There are other circumstances tending to corroborate the testimony of Foss, and the verdict seems to be in accord with the justice of the case.

The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

28	376
56	386

PRENTISS D. CHENEY, EXECUTOR, APPELLANT, V.

JAMES A. CAMPBELL, APPELLEE.

[FILED DECEMBER 31, 1889.]

1. **Negotiable Instruments: LIMITATIONS.** In an action to foreclose a mortgage on real estate there were five notes, each for \$60, due and payable in one, two, three, four, and five years. The notes were dated February 29, 1876, and the summons in the action, served on the defendant, was dated February 9, 1888. *Held*, That in an action to foreclose the mortgage the notes continued as evidence of the debt for ten years from the time they each became due, and that only the first of the above notes was barred.
2. —: **USURY: TRANSFER.** Certain notes given for grossly usurious interest, and secured by a second mortgage on real estate, were transferred to a *bona fide* holder for one-half of their face value, the claim of the purchaser being that the security might be inadequate. In an action by his executor to foreclose the mortgage, *held*, that the same rule would be applied as where the original consideration was wholly fraudulent, and the recovery would be restricted to the amount paid by the purchaser, with legal interest thereon.

APPEAL from the district court for Richardson county.
Heard below before BROADY, J.

L. C. Chapman, for appellant, cited: *Dorrington v. Meyer*, 8 Neb., 214; *White v. Rourke*, 11 Id., 519; *Ransom v. Schmela*, 13 Id., 74; *Studebaker v. McCargur*, 20 Id., 504.

S. P. Davidson, for appellee.

MAXWELL, J.

In the year 1876 the defendant Campbell borrowed \$600 from the plaintiff at twenty per cent interest, and, in addition to notes and a mortgage for the sum borrowed, gave five notes of \$60 each, secured by mortgage on real estate in Johnson county. Said notes are alike except as to the time of payment, and are in the following form:

"\$60. TECUMSEH, NEB., February 29, 1876.

"Two years after date, for value received, I promise to pay to the order of P. D. Cheney sixty dollars, payable at the office of Russell & Holmes, without interest before maturity, with twelve per cent per annum after maturity.

"JAMES A. CAMPBELL."

These notes were properly indorsed by Cheney, and he claims to have sold and delivered them before due to one Davis for a valuable consideration. The subsequent death of Davis is also alleged, and the appointment of Cheney as executor under his will. The allegations of the petition on that point are as follows:

"Plaintiff avers that before the said notes, or either of them, became due, the same were, by indorsement of said P. D. Cheney for a valuable consideration indorsed, assigned, transferred, and delivered to the said Wm. G. Davis in the lifetime of the said Wm. G. Davis, who was the lawful holder and owner of said notes during his life-

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time; and that said Wm. G. Davis departed this life on or about December 25, A. D. 1879, leaving said notes among the assets and effects of the estate of the said Wm. G. Davis, deceased. And that afterwards, to-wit, January, 1880, this plaintiff was duly and lawfully appointed executor of the said estate of Wm. G. Davis, as will more fully appear by reference to the certified copy of the letters testamentary herewith annexed."

To this petition Campbell filed an answer, in which he pleaded: First, usury and want of consideration; and, Second, the statute of limitations.

On the trial of the cause the court found the issues in favor of the defendant and dismissed the action.

The summons served on the defendant was issued on the 9th day of February, 1888, so that under the provisions of sections 6 and 19 of the Code but one of said notes was barred by the statute when the action was brought, viz., the first, as the limitation in an action to foreclose a mortgage on real estate is ten years.

This question has been so often decided by this court that it is unnecessary again to review it. For the purpose of foreclosure the notes continue as evidence of the debt, for ten years from the time they became due. (*Cheney v. Woodruff*, 20 Neb., 126; *Cheney v. Janssen*, Id., 132; *Studebaker v. McCargur*, Id., 503; *Herdman v. Marshall*, 17 Id., 259; *Cheney v. Cooper*, 14 Id., 418; *Stevenson v. Craig*, 12 Id., 469; *Hale v. Christy*, 8 Id., 268.)

All the testimony as to the transfer of the notes to Davis is that of the plaintiff and his brother. This testimony tends to show the notes in question were sold and transferred to Davis before due for \$150 in cash; that the reason Davis refused to pay more for them was that they were secured by a second mortgage, and that there was danger that the security would be inadequate.

The testimony of the plaintiff and his brother was taken by depositions, and the cross-examination by cross-inter-

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rogations. The answers to these are not very full, nor are the questions as searching as they probably would have been if the defendant's attorney had been personally present.

If we give this testimony any weight whatever, and we see no reason for rejecting it, then Davis was a purchaser in good faith of the notes in question.

The consideration for the notes in question, however, being wholly for usurious interest not permitted by law, the same rule will be applied in cases where the consideration was wholly fraudulent, the purchaser will be permitted to recover the amount paid by Davis with lawful interest thereon. (*DeKay v. Hackensack*, 38 N. J. Eq., 158; *Huff v. Wagner*, 63 Barb., 215; *Petty v. Hannum*, 2 Humph., 102.) The same principle is recognized in *Williams v. Smith*, 2 Hill, 301; *Buckner v. Jones*, 1 Mo. App., 538; *Holeman v. Hobson*, 8 Humph., 127; *Wiffen v. Roberts*, 1 Esp., 261.

The plaintiff is entitled to recover the amount paid by the testator for said notes with lawful interest thereon, and as the mortgage was executed while the act providing for an attorney's fee was in force, and the mortgage provides for a fee of \$25 in case an action to foreclose the mortgage is brought and decree obtained, a fee of that sum is hereby allowed to be charged as costs in the case.

The judgment of the district court is reversed and a decree will be entered in this court for \$120, with interest thereon to date.

JUDGMENT ACCORDINGLY.

THE other judges concur.

CHARLES B. RICE V. JOHN SAXON.

[FILED DECEMBER 31, 1889.]

1. **WILLS: TRUSTS: DESCENT.** One H., having a child by a former marriage, contracted a second marriage in 1869 or 1870. The issue of this marriage was one son. Afterwards the father made a will in which he bequeathed his real estate to a trustee for the use of his wife during the time she should remain his widow, and soon thereafter died. The power to dispose of the property, if it existed under the will, was not exercised. In 1877 the widow married one M., and the trust estate thereupon came to an end, and the heirs of H. were entitled to the property. In 1881 the son of H., the sole issue of the second marriage, died, unmarried, and without issue. *Held*, That the estate of said son descended in equal proportions to the mother and sister of said son.
2. ———: **DOWER.** The fact that the widow had elected to take under the will instead of claiming dower in the estate, merely precluded her from claiming aught against the heirs not provided for in the will, but did not debar her of an estate of inheritance from her son of the property mentioned in the will.

ERROR to the district court for Jefferson county. Tried below before MORRIS, J.

Charles B. Rice, pro se:

The provision in the will directing that the real estate should descend to the "legal heirs" was void in so far as it attempted to create an estate by purchase. Where a devise purports to give to an heir an estate which is precisely the same as the one he would inherit, he will take by descent and not by purchase. (4 Kent's Com., 506-7; 1 Chitty's Blackstone, 194; 1 Jarman, Wills, 75; Hilliard, Real Property, 528-9; *Gilpin v. Hollingsworth*, 3 Md., 190 [56 Am. Dec., 737], *Ellis v. Page*, 7 Cush. [Mass.], 161; *Parson v. Winslow*, 6 Mass., 178; *Whitney v. Whitney*, 14 Mass., 90; *Hubbard v. Rawson*, 4 Gray [Mass.], 242;

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Sedgwick v. Minot, 6 Allen [Mass.], 171; *Waters v. Stickney*, 12 Id., 1; *Ward v. Stowe*, 2 Dev. Eq. [N. Car.], 509 [27 Am. Dec., 238]). As John Edward Hughes died without issue and unmarried, all his estate inherited from his deceased father descended to his surviving sister, Eliza J. Hughes. (Comp. Stats., ch. 23, sec. 30.) Plaintiff in error, as the owner of all the interest in said real estate which Eliza J. Hughes inherited, is entitled to the same. Clara McCarroll, formerly Clara Hughes, having accepted the provisions of the will of John Hughes in lieu of dower, was not entitled to any further share in the latter's estate, and all deeds made by her and her grantees, under whom defendant in error claims, should be declared null and void.

John Saxon, contra:

The heirs could only have taken by purchase, since the devise was not to the testator's heirs but to an executor named in the will who took the whole estate in trust and for specified purposes. (*Estate of Delany*, 49 Cal., 76; *Herrick & Doxsee*, Prob. L. & P., 113, and cases cited.) And the devise contained not a particular estate with an outstanding reversion, but all "the estate of the devisor." (Comp. Stats., ch. 23, sec. 124; *Little v. Giles*, 25 Neb., 313.) When the trust estate terminated, it became, and yet is, the duty of the trustee to make conveyances to the legal heirs. (Gary, Probate Law, sec. 755, and notes.)

MAXWELL, J.

The plaintiff brought an action in the district court of Jefferson county to quiet his title to certain real estate therein. The defendant filed a petition to intervene in the case, which was sustained. On the trial of the cause the court made special findings as follows:

"First—That Eliza J. Compton, formerly Hughes, is the legitimate child of John Hughes, deceased, and that John

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Edward Hughes, deceased, was the legitimate child of John Hughes, deceased; that both of said children were living at the time of the death of said John Hughes, and were his only heirs—Eliza J. being his only child and daughter by his first wife, and John Edward the only child of his second marriage.

“Second—That John Hughes was divorced from his first wife in November, 1869, and afterwards intermarried with one Clara Slocumb, who was his lawful wife at the time of his death and the mother of John Edward Hughes, and that said Clara afterwards intermarried with one McCarroll on the — day of —, 1877.

“Third—That John Hughes died on the 12th day of March, 1873, leaving a last will and testament, which was duly proved and allowed in the probate court of Jefferson county, Nebraska, on the 17th day of April, 1873.

“Fourth—That at the time of his death said John Hughes was the owner in fee simple of the northeast quarter of section 23, town 2 north, range 3 east, of the 6th P. M., in Jefferson county; that the trust estate created by said will in the executor of said will, John Friday, ceased and determined on the marriage of said Clara Hughes to said McCarroll, and that said John Hughes, deceased, intended by the terms of said will to include both of his said children, Eliza J. Hughes and John Edward Hughes, in the disposition of his estate, and that on the determination of said trust estate each of said children became entitled to one undivided one-half of said real estate.

“Fifth—That John Edward Hughes died on the 9th day of July, 1881; that at the time of his death he was a minor and unmarried, and that he left surviving him his sister, Eliza Jane Hughes, and his mother, Clara McCarroll, and that he died intestate and without issue, and possessed of no property other than his interest in the real estate aforesaid.

“That Charles B. Rice is the owner of all the interest

in said real estate that Eliza J. Compton was entitled to at the death of John Edward Hughes, and that John Saxon is the owner of all the interest in said real estate that Clara McCarroll was entitled to at said time.

"As a conclusion of law, that plaintiff Charles B. Rice is entitled to and is the owner of an undivided three-fourths interest in and to the real estate in controversy, as the grantee of Eliza J. Compton, formerly Eliza J. Hughes.

"That defendant John Saxon, as the grantee of Clara McCarroll, is entitled to and is the owner of an undivided one-fourth interest in and to said real estate.

"Whereupon it is considered, adjudged, and decreed by the court that the title of the plaintiff Chas. B. Rice be, and is hereby, quieted, confirmed, and established in and to an undivided three-fourths in the northeast quarter of section 23, township 2 north, range 3 east, of the 6th P. M., Jefferson county; that the title of the defendant John Saxon be, and is hereby, quieted, confirmed, and established in and to an undivided one-fourth of said real estate; that the defendants Albert T. Shull, Chas. S. Carr, Henry L. McClure, Edward Hughes, William H. Snell, Alice Donnelly, Barney Carroll, Clara McCarroll, formerly Clara Hughes, or any of them, have no title or estate at law or in equity in or to said premises, and they and each of them are hereby restrained from asserting any title thereto or interest therein."

There is no bill of exceptions and the case is submitted to the court on the findings of fact and conclusions of law of the court.

We must assume that the findings of fact are satisfactory to both parties, there being no foundations laid to review the same.

Taking the findings of fact as correct, the estate bequeathed to Clara Slocumb Hughes, in the land in question, was to continue only during the time that she should remain a widow. There appears to have been no power of

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disposition of the property, or if so, it was not exercised, hence that question need not be considered. In 1877 she married again and her direct interest in the estate ceased. The estate then belonged to the heirs of John Hughes, one of which was John Edward Hughes, the son of Clara Slocumb Hughes. He died in 1881. Upon his death his estate descended, under the laws of the state, to those entitled thereunder to inherit.

Sec. 30 of chap. 23, Comp. Stats., 1887 provides that "When any person shall die seized of any lands, tenements, or hereditaments, or of any rights thereto, or entitled to any interests therein in fee simple, or for the life of another not having lawfully devised the same, they shall descend, subject to his debts, in the manner following:

"First—In equal shares to his children, and to the lawful issue of any deceased child, by right of representation; and if there be no child of the intestate living at his death, his estate shall descend to all his other lineal descendants; and if all the said descendants are in the same degree of kindred to the intestate, they shall have the estate equally. * * *

"Second—If he shall have no issue, his estate shall descend to his widow during her natural lifetime; and after her decease, to his father; and if he shall have no issue nor widow, his estate shall descend to his father.

"Third—If he shall have no issue, nor widow, nor father, his estate shall descend in equal shares to his brothers and sisters, and to the children of any deceased brother or sister, by right of representation; *Provided*, That if he shall have a mother also, she shall take an equal share with his brothers and sisters.

"Fourth—If the intestate shall leave no issue, nor widow, nor father, and no brother nor sister living, at his death, his estate shall descend to his mother, to the exclusion of the issue, if any, of the deceased brother and sister.

"Fifth—If the intestate shall leave no issue, nor widow,

and no father, mother, brother, nor sister, his estate shall descend to his next of kin, in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through an ancestor more remote.

*“Providing, however, Sixth—*If any person shall die, leaving several children, or leaving one child, and the issue of one or more other children, and any such surviving child, shall die under age, and not having been married, all the estate that came to the deceased child by inheritance from such deceased parent shall descend, in equal shares, to the other children of the same parent, and to the issue of any such other children who shall have died, by right of representation.

*“Seventh—*If at the death of such child who shall die under age, and not having been married, all the other children of his said parent shall also be dead, and any of them shall have left issue, the estate that came to said child by inheritance from his said parent shall descend to all the issue of other children of the same parent, and if all the said issue are in the same degree of kindred to said child, they shall share the said estate equally, otherwise they shall take according to the right of representation.

*“Eighth—*If the intestate shall leave a widow and no kindred, his estate shall descend to such widow.

*“Ninth—*If the intestate shall have no widow nor kindred, his estate shall escheat to the people of this state.”

The fact that Mrs. Hughes accepted the provisions made for her in the will of her husband in lieu of dower did not debar her from taking a part of that property by inheritance from her own son. In other words, by accepting the provisions of the will in lieu of dower, as between the heirs at law and herself, she could claim nothing pertaining to the estate except in accordance with the terms of the will.

When, however, the provisions of the will lapsed by her

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marriage, the heirs of the estate of John Hughes became entitled to the same. One of those heirs was the child of Clara Slocumb Hughes, and as such child died during its minority unmarried, and without issue, his estate descended one-half to his mother and the other half to his sister.

A large number of questions are discussed in one of the briefs before us, but as they do not arise on record before us they will not be considered. The plaintiff therefore is entitled to three-fourths of the real estate and the defendant one-fourth.

. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JACOB WICKS ET AL. V. LEVI NEDROW ET AL.

[FILED DECEMBER 31, 1889.]

1. **Religious Societies: PROPERTY: PARTITION.** In the year 1878 two acres of land were conveyed to trustees for the German Baptist church, of Falls City, for cemetery purposes. In 1880 a church edifice was erected for that society on said land, the funds for that purpose being raised by donations and subscriptions by members of the society and others. In May, 1884, differences of an immaterial nature sprang up among the members, and a conveyance of an undivided half of the property made by the trustees of the German Baptist church to the trustees of the Brethren church. This division was acquiesced in by the members and congregations of both organizations for three years, one organization occupying the church edifice on the first and third Sundays of each month, and the other on the second and fourth. *Held*, That the compromise being apparently fair, and having been acquiesced in for a long period, it should not be disturbed.
2. ———: ———: **SALE.** It being impossible to divide the property a judgment directing its sale and a division of the proceeds would be sustained.

APPEAL from the district court for Richardson county.
Heard below before BROADY, J.

E. W. Thomas, and *Frank Martin*, appellants:

The German Baptist church has legal capacity to own the property described in the petition. (*Trustees v. Froislie*, 37 Minn., 447 [35 N. W. Rep., 260].) Seceders from a congregation part with their interest in the church property, and the latter belongs to the portion which adheres to the old doctrines. (*Fernstler v. Seibert*, 114 Pa. St., 196 [6 Atl. Rep., 165]; *M. E. Church v. Wood*, 5 Ohio, 283; *Rottman v. Bartling*, 22 Neb., 412.) The same is true where parties are excommunicated, as in this case. (*Gartin v. Penick*, 5 Bush [Ky.], 110 [9 Am. L. Reg. (N. S.) 211]; *Watson v. Jones*, 13 Wall. [U. S.], 679; see also 12 Am. L. Reg. [N. S.], 344.) All members should have been notified of the special meeting at which the property was given away. (*People v. Peters*, 4 Neb., 254; *Russell v. State*, 13 Id., 70; *Martin v. State*, 23 Id., 384, and cases cited.)

Isham Reavis, and *C. Gillespie*, for appellees:

The church had the right to divide the property between the two factions. (*Angell & Ames, Corp.*, sec. 194; *Keyser v. Stansifer*, 6 Ohio, 363; *Wiswell v. Church*, 14 Ohio St., 31; *Gartin v. Penick*, *supra*.) The notice given at a regular Sabbath meeting was sufficient. (*Hubbard v. German Catholic Cong.*, 34 Ia., 31; *Eggleston v. Doolittle*, 33 Conn., 396; *Horton v. Baptist Church*, 34 Vt., 309; *Rex v. Whittaker*, 9 B. & C. [Eng.], 648; *Angell & Ames, Corp.*, secs. 501, 502, 505.)

MAXWELL, J.

This action was brought by the plaintiffs against the defendants to cancel a deed to the defendants and quiet the plaintiff's title and possession to a certain church edifice in

Richardson county. The defendants in their answer claim to be the owners of an undivided one-half of the property and ask the court to order a partition of the same. On the trial of the cause the court dismissed the petition for want of equity, and as the building could not be divided, ordered that the same be sold and the proceeds equally divided.

The testimony tends to show that in the year 1878 two acres of ground were conveyed to the trustees of the "German Baptist church" of Falls City, and their successors, to be used by said church for cemetery purposes, the consideration being \$40; that the plaintiffs thereupon took possession of said land, and about the year 1880 erected thereon a church edifice costing from \$1,500 to \$2,000. This money was raised by donations and private subscriptions, by members of the church and others. About the year 1884 differences seem to have arisen among the members, principally in regard to certain articles of dress; the result was the conveyance to the trustees of the defendants of an undivided one-half of the church property. Both organizations arranged their meetings so as to avoid a conflict, one organization occupying the edifice on the first and third Sundays of each month, and the other on the second and fourth. This arrangement continued from May, 1884, till the bringing of this suit, in April, 1888.

The principal contention of the plaintiffs is that the trustees of the plaintiffs had no authority to execute a deed to the defendants and that such deed is absolutely void. The testimony shows that there is but little or no difference in the doctrines of the two organizations, the principal controversy being over matters of apparently trifling importance; that all parties had contributed to the erection of the building and all seem to have acquiesced in the division of the property and its use. The attempt of the plaintiff to prove that the title to the property was in a body different from that of the trustees of the plaintiff at the time the deed was executed by them to the defendant was an

utter failure. The title seems to have been in the trustees and their conveyance having been acquiesced in for so long a time, and being, so far as appears, a just and fair division of the property, we are not prepared to say that the judgment of the court below is wrong, particularly where the testimony as to the rights of the respective parties is as meagre as in this case. Neither party seceded, but there being differences which prevented the members from working together harmoniously, they compromised their differences by dividing the property and occupying it on alternate Sundays. This compromise was acquiesced in for so long a period that it should not now be disturbed, and if from any cause the parties have so far forgotten the teachings of the Master as to be unable to dwell together in unity, then the property should be divided that each organization may receive its due portion. This the judgment of the court below will accomplish. It is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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142 687

WILLIE BROOKS ET AL. V. STATE OF NEBRASKA.

[FILED DECEMBER 31, 1889.]

1. **Larceny: VALUE: EVIDENCE.** In a prosecution for the larceny of goods, witnesses called to testify as to the value of the property stolen must show that they possess knowledge of the value of such property. (*Engler v. State*, 11 Neb., 539.)
2. ———: ———. Where the testimony showed that the property stolen consisted almost wholly of ready made clothing which had been worn on Sundays by the owner for about seven months, and that he could not testify to its actual value, an instruction that "as to the wearing apparel you will find its real value to the owner at the time of its being stolen," is erroneous.

ERROR to the district court for Lancaster county.
Tried below before FIELD, J.

Houston & Baird, for plaintiff in error.

William Leese, Attorney General, for the state.

Cases cited by counsel are referred to in opinion.

MAXWELL, J.

The plaintiffs in error were indicted in Lancaster county for willfully and maliciously, in the day time, breaking into the sleeping rooms of George Maxwell and Ed. Thompson in a dwelling house in said county, on the 17th day of November, 1888, with the intent to steal; and that they did at said time and place unlawfully, willfully, and feloniously steal, take, and carry away property of the said Maxwell and Thompson of the value of forty-eight dollars.

On the trial of the cause the jury returned a verdict of guilty against both of the plaintiffs in error, and found the value of the goods stolen to be \$36. They were thereupon sentenced to imprisonment in the penitentiary for two years.

The principal errors assigned in this court relate to the sufficiency of the testimony, and to the giving of the seventh paragraph of the instructions.

George Maxwell, a witness called by the state, after testifying to the loss of the goods in controversy, testified:

Q. What is this suit of clothes worth?

A. I valued them at that time——

(HOUSTON—I object, as no foundation is laid to show this man is competent to testify to value.)

Q. Were these tailor made clothes?

A. No, sir.

Q. Were the coat and vest?

A. No, hand-me-downs.

Q. How long had you worn them?

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A. I had worn them seven months.

Q. What did they cost?

A. They cost me \$25.

Q. How much were they damaged by wearing?

A. I had worn them for a Sunday suit.

Q. You may state what this suit of clothes were worth at the time they were taken from the room.

(HOUSTON—I object, till it is shown that the witness is competent to testify.)

A. I stated on my word and honor that they were worth \$20 to me.

Q. Did you lose anything else?

A. I lost a revolver.

THE COURT—Where is that suit of clothes?

STEARNS—They only found a pair of pants.

THE COURT—Are they there?

STEARNS—Yes, sir.

Q. How long had you had this revolver?

A. Three years.

Q. Would you recognize it if you saw it again?

A. Yes, sir.

Q. Is that it?

A. No, sir.

Q. Did you find it again?

A. I did not see it again.

Q. What kind of a revolver was that?

A. It was an American bull dog.

Q. How much had it been used?

A. I don't know, prior to my buying it, whether it had been used or not. I said three years I had it.

Q. Had you used it much?

A. No, sir; I had carried it that length of time when I had been traveling.

Q. What was the fair market value of that revolver when taken?

A. Five dollars.

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(HOUSTON—I object, as not shown competent to testify as to the value.)

Q. You bought and sold revolvers and saw what they sold for in the market?

A. I bought them and never sold any.

Q. By buying them do you know what they were worth?

A. Yes.

Q. What was this revolver worth in the market?

(HOUSTON—I object, because he has not shown himself competent to testify as to the value of these goods.)

Q. State what the fair market value of this revolver was.

A. Well, I stated it was worth \$5.

Upon this testimony the court instructed the jury as follows: "If you find the defendants, or either of them, guilty of larceny, then in arriving at the value of the goods stolen you are instructed that you must determine this question from evidence before you, the same as any other fact necessary to the determination of the guilt or innocence of the defendants. Nothing must be assumed or taken for granted against the defendants, and in fixing the value of goods you must be satisfied, beyond a reasonable doubt, from the evidence that the value of the goods stolen is the amount fixed by you in your verdict. In fixing the value of goods you are not to be entirely governed by the price they would bring if sold as second-hand goods, but as to wearing apparel you will find its real value to the owner at the time of its being stolen, taking into account its cost, the amount of wear it has been shown to have had, its condition as proved to have been at the time of taking; as to the other property, you will fix its value at such amount as you find from the evidence such property has been proven to have been worth at the time and place of taking."

Now, even if such evidence is admissible in certain

cases—as where the clothes have a peculiar value from some specific cause—it cannot apply to mere ready made clothing which can be bought at any clothing house, and therefore was not applicable to this cause. The seventh paragraph of the instructions, therefore, was clearly erroneous.

Under the rule announced by the court below, a witness, smarting under the loss of his property, might swear that a handkerchief costing 50 cents was worth \$50 to him, or a hat which cost \$3 was worth to him \$300. Such a rule practically nullifies the statute which makes the stealing of the goods of the value of \$35 a felony.

In *Engster v. State*, 11 Neb., 539, concurred in by Judge COBB, it was held “on the trial of one E. for receiving stolen goods the statute making the receiving of such goods of the value of \$35 and upwards a felony, that it devolved on the state to prove by competent testimony that the value of the goods was at least \$35.”

A witness, before he is competent to testify as to the value of property, must show by his testimony that he has knowledge of the value of such property.

The rule announced in that case is based on justice and should be adhered to unless there are good reasons for overturning it, which should be stated in the opinion.

In the brief of the attorney general it is said “it is not the policy of the law to discount the value or give rebates or special rates” to the thief. That is true. But neither has a court any right or authority, except mere force, to declare that a felony which the proof fails to show is such under the statutes. It is the duty of courts to administer the law, and it is a reproach upon any tribunal to allow a fictitious value to be placed upon stolen property in order to convict the accused of an offense higher than the facts will justify.

How can it be said that such a tribunal is impartial—holding the scales of justice even between the accused and

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the state. Had the legislature intended to change the rule in regard to the mode of proving values in cases of this kind, no doubt it would explicitly have so declared.

The precise question here presented was before this court in *Engster v. State*, 11 Neb., and it said: "A party who is permitted to testify as to the value of property must show by his testimony that he possesses knowledge as to such value, otherwise his testimony is mere conjecture and is wholly unreliable. In an indictment where the value of the property must be or exceed \$35 to constitute a felony, such value must be proved, like any other fact upon which a conviction depends, beyond a reasonable doubt. This is a material fact, without proof of which the prosecution must fail."

In that case one Signor was called as a witness on behalf of the state and testified:

Q. Are you a judge of clothing?

A. Yes, sir, of mine.

And showing no other knowledge he was held not qualified to testify as to values.

The proof in this case clearly shows that the real value of the stolen goods was much less than \$35, and the conviction of a felony was wrong, and is set aside, and the cause remanded to the district court.

REVERSED AND REMANDED.

CORB, J., concurs.

REESE, CH. J., dissenting.

The question presented in the case is, to my mind, not free from doubt. Upon this subject here presented there is a dearth of authorities. The usual rule, and that declared by the opinion in this case, does not seem to have been followed in all cases of this kind.

In *Fairfax v. N. Y. C. & H. R. R. Co.*, 73 N. Y.,

167, which was a civil action for the value of clothing alleged to have been lost by the defendant, in the action, the court of appeals, by Earle, J., says p. (172): "The court did not err in charging the jury that the plaintiff was entitled to recover the full value of the clothing for use to him in New York and not merely what it could be sold for in money. The clothing was made to fit plaintiff, and had been partly worn. It would sell for but little if put into market to be sold for second-hand clothing, and it would be a wholly inadequate and unjust rule of compensation to give plaintiff in such case the value of the clothing thus ascertained. The rule must be, the value of the clothing for use by the plaintiff. No other rule would give him a compensation for his damages. This rule must be adopted because such clothing cannot be said to have a market price, and it would not sell for what it was really worth."

In 2 Bishop on Criminal Procedure, sec. 751, the author, in discussing this subject, says: "Any evidence from which the jury can infer the value of a stolen chattel is competent, (*Houston v. State*, 13 Ark., 66) as: What the owner testifies of its value to him (*Cohen v. State*, 50 Ala., 108); the opinions of witnesses acquainted with like property," etc.

It was shown upon the trial what the clothing, alleged to have been stolen by the plaintiffs in error, had cost when it was purchased, how much it had been used, to what extent it was worn, and its value to the owner.

Plaintiffs in error called two witnesses—one a pawn-broker, the other a keeper of a second-hand store—and sought to prove by them the value of the goods in the market, they placing it much lower than the other witnesses.

We are unable to see why the rule stated in the authorities above cited should not be applied to cases of this kind as well as in civil cases. The question to be decided was, What was the value of the property at the time it was taken. That question would necessarily depend, to some extent,

upon what it would cost to replace it with goods of the same quality and grade as those taken. The reasonable value of the property would depend upon the amount of service they could render to their owner. The actual intrinsic value was to be ascertained. This could not be done by placing them in a second-hand clothing store, or a pawn shop, and running the risk of finding another person whom they would fit, and to whom they would be as valuable as to the original owner. Again, I do not think it was shown by the evidence introduced by plaintiffs in error, nor perhaps could it be, that such property has a regular merchantable market value.

As stated in substance in the case above cited, the clothing was especially adapted to the service of its owner. For him the suit had practically the same value as a new one, it having been worn but little. Now, to say that because there was no demand for partly worn clothing, and that it had no market value according to its quality, and that as one method of disposing of such property was by sacrificing it for perhaps less than half what it was worth in a second-hand store, taking the hazard of finding another person whom it would fit, and to whom it could be sold, the value must be fixed by that standard, rather than the intrinsic worth of the property, for the use to which it had been dedicated, would be an unjust rule either in a civil action or a criminal prosecution for the larceny of the property.

REPUBLICAN VALLEY R. CO. V. LOUIS FINK.

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57	442

[FILED DECEMBER 31, 1889.]

1. **Jurisdiction: EMINENT DOMAIN: TRESPASS.** In an action of trespass against a railway company for building a railroad over the plaintiff's land without condemning a right of way the railway company, among other things, pleaded as a defense the previous condemnation of the right of way, and the right to use the same. *Held*, That the issues made by the pleadings raised the question of title to said land, and the action was properly brought in the district court.
2. **Costs.** Where a judgment is reversed in the supreme court and remanded, the plaintiff in error is entitled to recover his costs which accrue in said court.

ERROR to the district court for Gage county. Tried below before BROADY, J.

Marquett & Deweese, (*Hazlett & Bates* with them), for plaintiff in error:

The amount claimed below being \$75, was within the jurisdiction of the justice. (Code, secs. 906, 1103.) Hence, plaintiff below could not recover costs. (Code, sec. 621; *Beach v. Cramer*, 5 Neb., 98; *Ray v. Mason*, 6 Id., 101; *Moore v. Darrow*, 11 Id., 462; *Rosenbaum v. Dunston*, 16 Id., 111; *Wilde v. Boldt*, Id., 539.) Statutes providing for costs must be strictly construed. (1 Bouvier, Law Dic., 370; *Stanton County v. Madison County*, 10 Neb., 308.)

Pemberton & Bush, *contra*:

The matter of costs was finally adjudicated by the decision of the district judge that the railroad company should pay them, and this order could not be modified at a subsequent term, except for reasons mentioned in sec. 602 of Code.

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(*Shepherd v. Rand*, 48 Me., 244; *Rogers v. Gosnell*, 51 Mo., 468; *Wright v. Sweet*, 10 Neb., 192; *Rogers v. Russell*, 11 Id., 362; *Penn. v. Bridge Co.*, 18 How. [U. S.], 460.) It is the amount demanded, not that recovered, which furnishes the test of the jurisdiction of the justice. (*Norton v. Hart*, 1 Ohio, 154; *Hancock v. Barton*, 1 S. & R. [Pa.], 269; *Wilson v. Daniel*, 3 Dall [U. S.], 401; Code, sec. 906.) In this case the amount demanded exceeded \$200.

MAXWELL, J.

In 1880 the plaintiff was constructing a railroad from the town of Wymore westwardly, and located its line over a portion of the defendant's land. The defendant was a non-resident of the state, and the plaintiff, without taking the necessary steps to condemn the defendant's land by failing to publish the proper notice, built its road across the same. The defendant thereupon brought an action of trespass, and recovered judgment. Both parties in that action seem to have proved the damages for the appropriation of the right of way.

The case was brought into this court and reversed for various reasons, among others that the statutory mode of condemning the right of way was exclusive. (*R. V. R. Co. v. Fink*, 18 Neb., 82.)

The cause was then remanded to the district court, where a second trial was had for the trespass alone, which resulted in a verdict of \$75, upon which judgment was rendered. Proceedings were also had to condemn the right of way, and that question seems to have been adjudicated, and is not in this case.

The court on rendering judgment in the trespass case also rendered judgment against the railroad company for all the costs in the case, including those in the supreme court.

The only question before us now is the correctness of the ruling of the district court in awarding the costs. To determine this matter it will be necessary to consider the pleadings in the case. The petition is as follows:

"Louis Fink, plaintiff in the above entitled action, complains of the defendant, and for cause of action says: That heretofore, to-wit, at the time hereinafter mentioned the defendant was, and still is, a corporation duly organized under the laws of the state of Nebraska, and that before and at the time of committing the injury hereinafter complained of the plaintiff was the owner and was possessed of the following described real estate, to-wit: The southeast quarter of section 25, township 2 north, of range 6 east of 6th P. M., lying in the county of Gage, state of Nebraska; that the defendant, during the years A. D. 1880, 1881, and 1882 did unlawfully, and with force and arms, break, enter, occupy, and ever since has occupied, a portion of the close of the said plaintiff, and then and there built and laid their line of railroad, which they have ever since operated, thereby converting to their own use $4\frac{1}{10}$ acres of land out of the southeast corner of the aforesaid described piece or parcel of land, whereby the plaintiff for and during all that time lost and was deprived of the use and benefit of said $4\frac{1}{10}$ acres of land. All of which is to the damage of the plaintiff in the sum of \$1,000."

A supplemental petition was also filed as follows:

"The plaintiff alleges that since the filing of the former petition in the action, to which this is supplemental, the said defendant has wrongfully and unlawfully continued, and still continues, the several acts of trespass charged against it in the former petition on the lands and premises of the plaintiff and described in said petition. Whereby the plaintiff during all of which time lost and was deprived of the beneficial use of said premises, to the damage of plaintiff in the sum of \$1,000. Wherefore the said plaintiff prays judgment against the said defendant for the said

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sum of \$1,000, in addition to the amount prayed for in the former petition, together with costs of suit."

To these petitions the plaintiff filed the following answer:

"Now comes the defendant, and by leave of court makes the following amended answer to the amended petition filed by the plaintiff.

"The defendant says that whether the plaintiff is the owner of the southeast quarter of section 25, township 2 north, of range 6 east of 6th P. M., in Gage county, the defendant has not knowledge or information sufficient to form a belief, and therefore denies the same; that defendant says that about the month of ———, 1880, the defendant company located and constructed a line of railroad over and across the southeast corner of the southeast quarter of the southeast quarter of section 25, township 2, range 6 east, in Gage county, and the said line of road has been maintained and operated ever since it was constructed; that prior to the construction of said line of road over the said land, the defendant endeavored to agree with the plaintiff upon the amount of damages that should be paid to him for the right of way over and across the said line, for the location and construction of its line of railroad, and endeavored to procure from the said plaintiff a right of way deed for said purpose; but that the plaintiff and defendant failed to agree upon the amount of damages to be paid for said right of way; that the defendant thereupon, and prior to the location and construction of the said line of road, proceeded to have the right of way condemned over and across the said lands, as provided by statute, and the damages which the plaintiff would and did sustain, by reason of said location and construction, and the right of way duly ascertained and awarded by commissioners duly appointed by the county judge of said county; that the plaintiff was duly notified of these proceedings, as provided by law, and the commissioners then appointed made a

report of their proceedings in this matter, and filed the same with the county judge, awarding to the plaintiff the sum of \$75, and that said amount thus awarded to him was duly deposited with the county judge of said county for the plaintiff, as provided by law, on the 20th day of May, 1881, and which, if not withdrawn by the plaintiff, still remains on deposit for him.

"Further answering the said petition the defendant says that the plaintiff ignored the condemnation proceedings that had been had for the right of way over his said land, and claimed that the same were illegal; and the defendant, hoping to settle all controversy on that point, did, on the 10th day of March, 1886, serve the plaintiff personally with a new notice of condemnation proceedings for the right of way over said land, and the said company made application to the county judge for the appointment of a commission as provided by law, and such commission was appointed by said judge, and which commission proceeded, on the 24th day of March, 1886, to examine the plaintiff's premises and the crossing of the same by the line of railroad, and after duly viewing the same they awarded damages to the plaintiff in the sum of \$152.78 including interest at the rate of seven per cent per annum from the time of the taking and appropriation of said right of way by the railroad company; that said amount thus awarded was duly deposited with the county judge of said county, for the use of the plaintiff, on the 24th day of March, 1886, and unless withdrawn by the plaintiff the same remains in deposit for him.

"The defendant therefore says that the plaintiff has no cause of action against the defendant; and the defendant denies each and every allegation contained in the plaintiff's petition, except as hereinbefore admitted or modified.

"SECOND DEFENSE.

"As a second defense of the plaintiff's cause of action the defendant says that prior to, and at the time of the lo-

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cation and construction of its line of road over the said land, the plaintiff's son, Louis H. Fink, resided thereon, and the plaintiff was present on said premises, making his home, while in this city, with his said son, and efforts were made to agree with the plaintiff for the right of way across the same; and while the plaintiff and defendant disagreed as to the amount of damages that should be paid, the plaintiff interposed no obstacle in the way of the construction of said line of road, and made no objection to the construction of the same, but simply objected to the amount of damages that the defendant was willing to pay. The plaintiff frequently conferred with the railroad company in regard to settling his claim for damages, but never at any time objected to the occupancy of said right of way by the railroad company in the construction of said line of road.

"The defendant therefore avers that the plaintiff is estopped from bringing and maintaining this action for damages in trespass by reason of the facts above set forth; that he has no cause of action against the defendant, and the court has no jurisdiction to try and determine the damages claimed by the plaintiff."

It will be observed that the plaintiff puts in issue the defendant's right to the land condemned for right of way. In other words, the question of title to real estate was involved under the issue made in the pleadings.

A condemnation of the right of way was pleaded, which, if legal, would wholly defeat the action.

The validity of this condemnation could not be determined by a justice of the peace, and necessarily the action must be brought in the district court, and therefore a justice of the peace had not jurisdiction of the case.

The plaintiff, however, was entitled to recover its costs in this court on the reversal of the judgment in its favor, and to that extent the judgment of the court below will be modified.

JUDGMENT ACCORDINGLY.

THE other judges concur.

CHARLES H. KETTLER v. C. W. KETTLER.

[FILED DECEMBER 31, 1889.]

1. **Partnership: ACCOUNTING: REFERENCE.** In an action to dissolve a partnership, and for an accounting, the case was referred to a referee, who made findings of fact and in favor of the plaintiff for a sum in excess of that claimed in the petition. Exceptions to the report were thereupon filed, which were overruled, but the judgment was reduced to the sum claimed in the petition with interest thereon. *Held*, No error.
2. **Report and judgment fully sustained by the evidence.**

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

Cavanaugh, Crane & Atwell (with whom was *W. E. Healey*) cited: *Bates*, Partnership, secs. 312, 767; *Parsons*, Partnership, 245; *Robinson v. O'Connor*, 12 Neb., 405; *Ryan v. Dougherty*, 30 Cal., 218; *Francis v. Ames*, 14 Ind., 251; *DeLong v. Stahl*, 13 Kan., 558; *Smith v. Warner*, 14 Mich., 152; *Brower v. Kingsley*, 1 Johns. Cas. [N. Y.], 334; *Hanner v. Coffin*, 1 Or., 99; *White v. Puryear*, 18 Tenn., 440.

J. W. West, *contra*, cited: *Mills v. Miller*, 2 Neb., 317; *Cropsey v. Wiggenghorn*, 3 Id., 117; *Joiner v. Van Alstyne*, 20 Id., 579; *Hosford v. Stone*, 6 Id., 378; *Fox v. Mecham*, Id., 533; *Light v. Kennard*, 11 Id., 130; *Roggencamp v. Dobb*, 15 Id., 621; *Ponca v. Crawford*, 18 Id., 551; *Gibson v. Sullivan*, Id., 558; *Deitrichs v. R. Co.*, 13 Id., 46.

MAXWELL, J.

This is an action to dissolve the partnership between the parties and for an accounting.

The plaintiff is the father of the defendant, and in his

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petition, after stating the formation of the partnership and the amount of capital put into the firm by the plaintiff, he alleges that the defendant has falsified the books of the partnership firm by making false and erroneous charges against the firm, and failing and refusing to make proper entries of moneys and goods received by defendant on the partnership account; that defendant has appropriated to his separate use partnership property and funds without the consent of plaintiff; that defendant has conducted himself with such great rudeness and incivility toward plaintiff, who is defendant's father, as to make personal association as partners unbearable and unreasonable; that defendant, by gross negligence, and contrary to the express admonitions and counsel of plaintiff, persisted in giving credit to a number of irresponsible persons, and by said gross negligence and headstrong course pursued by defendant the partnership firm has suffered needless losses; that by reason of the facts stated in paragraphs 9, 10, and 11 hereof a bitter feeling of animosity has been engendered between plaintiff and defendant, which utterly precludes all reasonable hope of reconciliation and friendly co-operation.

"Your petitioner further states that he is a man far advanced in years, to-wit, seventy years of age, and of feeble health and mind, while his partner, his son, defendant herein, is a young man, to-wit, twenty-seven years of age, and of vigorous mind and body; that said agreement was entered into at the request and earnest solicitation of defendant and against the inclinations and by the reluctant consent of plaintiff; that by reason of defendant's relationship to plaintiff and of the great discrepancy between their ages, and physical conditions of body and activities of mind defendant had at the time of entering into said agreement a great and overpowering influence over plaintiff, all of which defendant well knew."

The defendant in answer to the petition makes a number of specific denials, among others the existence of the part-

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nership, and pleads losses in the business. The cause was referred to a referee, who took the testimony and made findings as follows :

"First—That the total original stock was \$1,728.37 of which the plaintiff put in \$725 and the defendant \$1,003.37.

"Second—That the partnership made net gains over and above all its expenses and liabilities, and that the amount thereof during that period covered from December 30, 1886, to June 18, 1887, is \$517.

"Third—That the amount of the net assets of the firm on June 18, 1887, is \$454.84.

"Fourth—But that the net assets of the firm on June 18, 1887, should be the original capital stock, \$1728.37 plus the net gain, \$517, or \$2,245.37.

"Fifth—That there is a shortage in the firm's assets, and that the amount thereof is the difference between what the net assets are, viz., \$454.84, and what the net assets should be, viz., \$2,245.37 or \$1,790.53.

"Sixth—I find that C. U. Kettler, the defendant, exercised the general management and control of the business of the firm; did all the buying for the firm, and paid out all moneys; was the sole custodian of the daily receipts of the firm; made all deposits in the bank and signed all checks; in short, that he had the exclusive personal control of the entire finances of the firm from the beginning to the end.

"Seventh—I find that the individual interest of C. H. Kettler, the plaintiff, in the firm on June 18, 1887, after all his share of the debts and liabilities are deducted, to be the sum of \$901.97.

"FINDINGS OF LAW.

"I find that C. U. Kettler, the defendant, is liable for the shortage above discovered, viz., the sum of \$1,790.53"

Exceptions were filed to the report, which were over-

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ruled, but the claim of the plaintiff was reduced to \$725 and interest, being the amount claimed in the petition.

The report of the referee is very full and the reasons for his findings are set out at length therein. Those reasons in the main are correct and the findings of fact are fully supported by the evidence.

The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

VILLAGE OF VALPARAISO V. ANNA DONOVAN.

[FILED DECEMBER 31, 1889.]

1. **Villages: DEFECTIVE SIDEWALKS: PERSONAL INJURIES.** A lady named D. in passing over a defective sidewalk in the village of V., in consequence of the defects in such walk, was tripped and thrown down and sustained injuries whereby she lost the use of her left hand. She brought an action against the village, and having recovered judgment, *held*, that it was fully sustained by the evidence.

ERROR to the district court for Saunders county. Tried below before MARSHALL, J.

G. W. Simpson, for plaintiff in error:

Municipal corporations are not insurers against accidents. (*Chicago v. McGiven*, 78 Ill., 352; *Atchison v. Jensen*, 21 Kan., 575.) Injury alone is not a sufficient ground of recovery; it must be shown that the walk was dangerous, and that plaintiff in error had notice. (*City of York v. Spellman*, 19 Neb., 357; *City of Plattsmouth v. Mitchell*, 20 Id., 228.) Defendant in error was guilty of contributory negligence and cannot recover. (*City of Lin-*

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coln v. Walker, 18 Neb., 244; *Brown v. Kendall*, 6 Cush. [Mass.], 292; *Murphy v. Deane*, 101 Mass., 455; *Marble v. Russ*, 124 Id., 50.) There are no degrees of negligence as implied by the thirteenth instruction. (*A. & N. R. Co. v. Washburn*, 5 Neb., 120; *City of Lincoln v. Gillilan*, 18 Id., 117; *Ill. R. Co. v. Hetherington*, 83 Ill., 510.)

S. H. Sornborger, and *Allen, Robinson & Reed*, contra:

Under secs. 67b and 69, Comp. Stats., the village is liable. (*City of Omaha v. Olmstead*, 5 Neb., 452; *City of Crete v. Childs*, 11 Id., 252; *City of Lincoln v. Walker*, 18 Id., 250; *Same v. Woodward*, 19 Id., 259; *City of York v. Spellman*, Id., 357; *City of Plattsmouth v. Mitchell*, 20 Id., 228; *Nebraska City v. Rathbone*, Id., 228.) The rule as to cities applies to villages. (*Village of Ponca v. Crawford*, 18 Neb., 662; *Village of Orleans v. Perry*, 24 Id., 831; *Pomfrey v. Saratoga Springs*, 11 N. E. Rep. [N. Y.], 45; *Dooley v. Sullivan*, 112 Ind., 451; 14 N. E. Rep., 567; *Beazan v. Mason City*, 58 Ia., 233; 12 N. W. Rep., 279; *Kellogg v. Janesville*, 34 Minn., 132; 24 N. W. Rep., 359.) Contributory negligence which would defeat a recovery must be such as helped to cause the injury. Slight want of diligence as pointed out in the thirteenth instruction will not prevent recovery. (*Cremer v. Portland*, 36 Wis., 92; *Hammond v. Mukwa*, 40 Id., 35; *Otis v. Janesville*, 2 N. W. Rep., 783; *Union Pacific R. Co. v. Henry*, 14 Pac. Rep., 3.)

MAXWELL, J.

The defendant in error sustained a severe injury by falling on a defective sidewalk in the village of Valparaiso, and brought an action to recover damages therefor. The testimony tends to show that in consequence of the injury the defendant in error has lost the use of her left hand. On the trial of the cause the jury returned a verdict for

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\$1,000, and motion for a new trial having been overruled, judgment was entered on the verdict.

The character of the sidewalk where the injury occurred is described by the witness D. F. Riley, who at that time was the marshal of said village. He testifies:

Q. I will ask you if you were familiar with the condition of the sidewalk that runs along on the south side of block 12, on the north side of Second street, in that town?

A. Block 12, did you say?

Q. Lot 12, block 1, I think—along lot 12, of block 1, in the village of Valparaiso, in this county.

A. Yes, sir; I know where it is.

Q. You knew its condition at that time did you, Mr. Riley?

A. Well, yes.

Q. You may state what its condition was.

A. Well, it was broken up some at that time.

Q. You may state what buildings are along there, right where this sidewalk was, Mr. Riley.

A. Mr. Tighe's billiard hall.

Q. Well, after you leave Mr. Tighe's billiard hall going east, isn't it?

A. Yes, sir.

Q. How was the walk after you left there, and when you came in front of block 12, or lot 12, block 1?

A. The walk in front of block 12 was rather a poor walk.

Q. I will ask you if the walk right there—if there is any kind of a slope to it, or how it was built; when you first come on lot 12, coming from the west to the east, was there a slope or was it level?

A. It sloped down to the level with the ground; the west end of the walk on the lot was raised perhaps a foot or eighteen inches from the level of the ground.

Q. Coming from the west and going east on that walk, that is, on this lot, what is the first building you happen on; is it a blacksmith shop?

A. Blacksmith shop.

Q. Now, how far is it from the door of this blacksmith shop until you strike the line of that lot; that is, until you strike the lot that you have described as that billiard hall; about how far?

A. The walk in front of the billiard hall?

Q. Yes, sir, until you happen on that walk, until you strike the edge of it.

A. Well, from the west side of the door of the blacksmith shop to the walk on the other lot is thirteen feet and some inches, I think.

Q. About thirteen feet and some inches?

A. Yes, sir.

Q. Now, I will ask you as to that one part of this walk, ask you to describe to the jury the condition, as near as you can, of that walk along about the 4th of November, 1887, i. e., that part of the walk we have indicated from the west door of the blacksmith shop until you reach the east end of the billiard hall?

A. Well, it has been broken up in pretty bad shape part of the time.

Q. You say it was broken up?

A. Yes, sir.

Q. How do you mean?

A. Why, the boards were broken and split.

Q. Were there any holes in this walk—you mean by that expression, were there any holes in it?

A. Yes, sir, there were holes in it.

Q. Now, I will ask you, Mr. Riley, of what material was this walk made?

A. It was originally made of fencing boards.

Q. How many stringers were to it?

A. Three stringers.

Q. Did it bear the indication of ever having been repaired?

A. Yes.

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Q. You may state how it was repaired and of what material at this time that the indication of the walk showed any repairs; and of what material those repairs had been made.

A. Well, it was repaired with pieces of dry goods boxes, with pieces of old wagon box boards, that is, boards where boxes had been torn up, pieces were in there; the ends broken off, boards in the original walk, the end of the stringers of the walk, a space of about six inches maybe, the ends broke off some of them.

Q. How wide was the walk at this time?

A. In the first place the walk was four feet wide.

Q. Was it still that wide at that time?

A. Some boards were pieces about two feet ten inches, and three feet—somewhere there, just as they happened to get hold of pieces of boards.

Q. How long had the walk been in that condition before the 4th of November, 1887?

Q. Oh, it had been broken up considerably for quite a while before that; I don't know just how long, but it had been some time.

Q. Was it long as a month?

A. Yes, sir, as long as two months.

Q. Who kept that shop there on lot 12—blacksmith's shop?

A. Mr. Wells.

Q. Was he a member of the village board at that time?

A. Yes, sir, he was a member of the board at that time.

Q. Now I will ask you, Mr. Riley, if you, acting as marshal, ever gave notice to any of the other officers of the village as to the condition of the sidewalks, and of this one spot in particular?

A. I spoke to the street commissioner about it; he and I talked about it at different times.

Q. When was that; that was before this accident occurred?

A. Before the accident occurred.

Q. Did you ever speak to Mr. Wells, the owner of the shop there?

A. I think Mr. Wells and I had a talk about the condition of the sidewalk there.

Q. You may state if you ever spoke to any other members of the board or village officers. You spoke of the street commissioner and Mr. Wells; now you may state if you ever spoke to any others in regard to this walk.

A. I spoke to Mr. Mosgrove.

Q. What office did he hold?

A. He was one of the town board.

Q. How long before this accident did you speak to him about it, can you recollect?

A. It was along sometime near the time the accident happened.

Q. You may state what you told them in regard to the walk, if you can recollect?

A. I don't know as I could state just exactly.

Q. Well, the substance of it?

A. I informed them that the walk was in bad shape, and ought to be fixed up.

Q. You informed them in a general way that the walk was in a bad shape and ought to be fixed up?

A. Yes, sir.

It will thus be seen that the walk was in a dangerous condition a long time before the accident, and the village authorities had full notice thereof, but made no effort apparently to have the same repaired.

The evidence therefore fully sustains the verdict and we see no error in the instructions.

The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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JOSEPH MILLER, APPELLEE, v. S. B. CAMP, APPELLANT.

[FILED JANUARY 7, 1890.]

Justice's Court: APPEAL FROM: TIME. Plaintiff filed his petition in the district court alleging that on the 14th day of February, 1885, he commenced an action before a justice of the peace in F. county against the defendant for the sum of \$47, due on final settlement between the parties; that defendant appeared and obtained an adjournment until a time when plaintiff was compelled to remove from the county, and that he abandoned the suit, dismissed it, and paid the costs; that subsequent thereto the defendant, in fraud of plaintiff's right, filed a counter-claim with the justice of the peace for \$246, and fraudulently obtained a judgment against plaintiff for \$199, plaintiff having in the meantime changed his residence to H. county; that about one year and a half after the rendition of the judgment he was first made aware of its existence by the levy upon his property by the sheriff of the county of his residence; that he had a complete defense to the claim of the defendant, and had been damaged by the seizure of his property, etc.,—with prayer for a decree setting aside the judgment, and for general relief, and for judgment for \$272. It was *held*, that these facts, if proven, would not authorize the district court to grant an appeal from the judgment of the justice of the peace four years after its rendition.

APPEAL from the district court for Fillmore county.
Tried below before MORRIS, J.

F. B. Donisthorpe, for appellant.

Geo. E. Banks, and *John D. Carson*, for appellee.

REESE, CH. J.

This action was instituted in the district court of Fillmore county. The petition was as follows:

"Plaintiff complains of the defendant and alleges:

"First—That on or about the 14th day of February,

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1885, plaintiff commenced an action against defendant in the justice court before J. D. Hamilton, a justice of the peace in and for Geneva precinct, in Fillmore county, Nebraska, to recover the sum of (\$47) forty-seven dollars, due on final settlement from defendant for work, and labor, and care of stock by plaintiff for defendant.

"Second—That on or about the 8th day of March, 1885, plaintiff desiring to remove from said county of Fillmore, and also learning that said Silas B. Camp, defendant, was insolvent and wholly worthless, paid the accrued costs and dismissed the action, and on or about the 9th day of March, 1885, removed to Hitchcock county, Nebraska, and has continued to reside in said county until the present time.

"Third—On or about the 10th day of March, 1885, defendant Silas B. Camp fraudulently filed in the office of said J. D. Hamilton, justice of the peace, a counter-claim and set-off against plaintiff in the amount of (\$246) two hundred and forty-six dollars, and on or about the 21st day of March, 1885, fraudulently obtained a judgment against the plaintiff for the sum of (\$199) one hundred and ninety-nine dollars and costs, taxed at (\$10.95) ten $\frac{95}{100}$ dollars. A transcript of the proceedings and judgment is hereunto annexed, marked 'Exhibit A.'

"Fourth—Plaintiff first learned of the filing of said counter-claim and set-off, and the judgment thereon rendered, on or about the 25th day of November, 1887, when R. H. Stearns, deputy sheriff of Hitchcock county, came to the farm of plaintiff in said county, representing that he had an execution issued from the district court of Fillmore county, in favor of Silas B. Camp, defendant, and levied upon and drove away his stock of cattle and horses, (17) seventeen head in all.

"Fifth—Plaintiff further says he never was and is not now indebted to defendant in the sum of said judgment, nor the several sums set forth in defendant's counter-claim and

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set-off, above referred to, nor any part thereof, and has a good and complete defense thereto.

"Sixth—Plaintiff says that by reason of said fraudulent judgment, and the issuance of said execution, he has been greatly damaged; that his cattle and horses were driven about twelve miles, while cold and stormy, and were exposed to the elements about (6) six days, to their damage in the sum of (\$25) twenty-five dollars; that he was compelled to employ attorneys to institute proceedings to prevent the sale of his said cattle and horses and to prosecute his case, and has paid said attorneys in fees and expenses the sum of (\$100) one hundred dollars, and will have to pay the further sum of fees to said attorneys and expenses in traveling from Hitchcock county to Fillmore county of (\$100) one hundred dollars.

"Plaintiff prays that said judgment be set aside and declared fraudulent and void, and for such other relief as justice and equity may require, and that he may have judgment against defendant for the sum of (\$272) two hundred and seventy-two dollars, and interest thereon from the first day of December, 1887, and costs of suit."

Defendant answered, admitting the allegations in paragraph number one of the petition, and that the counter-claim for \$246 was filed with the justice of the peace, and the judgment rendered thereon for \$199 as alleged. All other averments were denied.

A trial was had to the district court, which resulted in the following judgment:

"And now, to-wit, on this 28th day of May, 1889, this cause coming on for hearing, on the petition, in equity filed herein, and answer of defendant, the court, after hearing the evidence and facts in the case, also the arguments of counsel, and after being fully advised in the premises, the court finds that the plaintiff was unaware of the filing of the counter-claim of defendant herein in the action pending before the justice of the peace, but that plaintiff herein,

and then plaintiff therein, paid the costs and supposed cause was dismissed.

"It is therefore considered that plaintiff herein may now file an appeal bond in the justice court, sureties to be approved by the clerk of the district court, now, as of the time when the same should be filed, on plaintiff's paying all costs of defendant since the filing of the set-off in the justice court; that plaintiff file such appeal bond in ten days, and cause then further proceed herein in conformity to law.

"To all the said rulings of the court the defendant, by his counsel, duly excepts."

From this judgment defendant appeals.

The evidence submitted to the district court was very meager and quite unsatisfactory. It is difficult to say, from the petition, whether the collection of the judgment rendered against plaintiff by the justice of the peace has been enforced, or has been paid. Upon that subject no evidence was offered; but, from the whole case, we infer not. It is shown by the evidence that defendant instituted his suit against defendant before a justice of the peace for the recovery of the sum of \$47, and that at some time thereafter the costs were paid by plaintiff, and that he probably supposed he had dismissed the suit; but if any effort at such dismissal were made, it does not appear in the transcript of the justice, nor is there any direct proof of the fact. The judgment was rendered on the 21st day of March, 1885. This suit was commenced on the 20th day of January, 1838, and the judgment was rendered on the 28th day of May, 1889—more than four years after the rendition of the judgment. If plaintiff paid the costs, and in good faith sought to dismiss the suit, before the counter-claim was filed, and defendant fraudulently procured a judgment rendered in his favor, against plaintiff, plaintiff can probably obtain relief against it in a proper action, but we know of no law—nor has our attention been called to any by plaintiff—which, as a measure of relief,

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will allow him, at this late date, to appeal the case to the district court. The time within which an appeal may be taken is fixed by section 1007 of the Civil Code, and we know of no law by which the time can be extended by the court, unless by the default of the officers, and without negligence on his part, the party seeking to appeal is prevented from doing so.

It appears that plaintiff is of foreign birth and does not understand the English language and is perhaps quite illiterate, and although he was represented by counsel before in the suit before the justice, he may have been misinformed by the justice through a failure to understand the language spoken; yet that could not extend the time in which to appeal, whatever may be his equitable right as against the judgment.

The judgment of the district court will be reversed, and in order that plaintiff's rights, if any, may not be sacrificed, the cause will be remanded to that court for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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39	660
28	416
40	490
28	416
48	43
29	416
50	321

LAVINA J. FOSTER ET AL. V. JAMES DEVINNEY ET AL.

[FILED JANUARY 7, 1890.]

1. **Findings: ESSENTIAL TO VALIDITY OF JUDGMENT.** In all actions tried by the court, there must be a general finding, and, when requested by one of the parties, a special finding; and if this finding be vague, uncertain, or indefinite, it will not sustain a judgment. (*Sprick v. Washington Co.*, 3 Neb., 253.)
2. ——— : ———. Issues properly presented to a trial court must be decided either by finding by the court or verdict of the jury before a judgment can be rendered.

ERROR to the district court for Johnson county. Tried below before APPELGET, J.

S. P. Davidson, for plaintiffs in error, cited: *Smith v. Silvia*, 8 Neb., 168; *Pleuler v. State*, 11 Id., 547; *State v. Com'rs*, 12 Id., 55; *Warriok v. Rounds*, 17 Id., 412; *Vanderlip v. Derby*, 19 Id., 168; *State v. Weber*, 20 Id., 470; *State v. Bonsfield*, 24 Id., 521.

L. C. Chapman, for defendant in error Devinney, cited: *Sharp v. Speir*, 4 Hill [N. Y.], 76; *Sharp v. Johnson*, Id., 92; *Bouton v. Brooklyn*, 15 Barb. [N. Y.], 395; *In re Ingraham*, 64 N. Y., 311; *Woodruff v. Harrel*, 67 Tex., 398.

Daniel F. Osgood, for the same party, cited: *Haller v. Blaco*, 14 Neb., 196; *White Lake Lumber Co. v. Stone*, 19 Id., 402; *State v. Ragland*, 75 N. Car., 12; 1 Washburn, Real Property [5th Ed.], pp. 87, 89-60; 6 Am. & Eng. Encyc. of Law, 895.

A. M. Appelget, for defendant in error Frost, cited in addition to the last list of authorities: *Lowrie v. France*, 7 Neb., 191-3.

Clarence K. Chamberlain, for the city of Tecumseh, cited: *People v. Board*, 38 Mich., 95; Tiedeman, Real Property, secs. 26, 462; 1 Washburn, Real Property, pp. 57, 76; Sedg. & W., Trial of Title, sec. 13.

REESE, CH. J.

Defendants in error each filed a separate petition before the city council of the city of Tecumseh for a license to sell malt, spirituous, and vinous liquors in said city. Each application had thirty-one names attached. These petitions were filed on the 16th day of April, 1889, and on the 7th

day of May remonstrances were filed in each case, in which the following, among other objections to the issuance of the license were presented.

"That the applicant had violated the laws and ordinances governing the sale of liquor in said city during the year last past, by selling intoxicating liquors to habitual drunkards and to minors, and by allowing treating in his place of business; that the petitions were not signed by the requisite number of freeholders of the ward where the saloons were proposed to be kept; that some of the signers—naming them—were not freeholders; that the names of others were signed without their authority, and that they wished to withdraw them therefrom."

By agreement, the applications were so far consolidated as to allow of both being heard upon the same evidence, and decided at the same time by the city council. A license was granted in each case when the remonstrants appealed to the district court where the cause was heard, and the decision of the city council was affirmed. The cases are now brought to this court by remonstrants by proceedings in error.

It is objected by counsel for Frost that no appeal was taken in his case, for the reason that but one appeal was perfected, and as there was no agreement in the district court that one case should abide the result of the other, the cases were not consolidated for any purpose save the hearing before the council. This objection, had it been made in the district court, would perhaps have been meritorious, but as the cases have been treated by all parties as one since before the hearing by the council, the objection cannot now avail.

It is conceded in this court that as the name of E. T. Curren was signed to the application without her consent or authority, it should not be considered. This leaves thirty names—the statutory number, there being more than sixty freeholders in the ward. (See sec. 25, chap. 50, of Comp. Stata.)

It is contended by plaintiffs in error that the finding of the district court is insufficient to sustain the judgment. So far as this part of the journal entry of that court is concerned, the finding was as follows: “* * * and after arguments of council, the court finds that the action of the city council should be affirmed, and the action of said city council, in granting license to said applicants, held valid,” etc. This objection was presented to the district court by the motion for a new trial, in the sixth clause thereof, by the following language: “6. Because there is no legal and sufficient finding of fact by the court,” and it is insisted upon here.

By section 428 of the Civil Code a judgment is defined to be a final determination of the rights of the parties to an action.

By section 297 it is provided that “Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding except generally for the plaintiff or defendant, unless one of the parties request it with the view of excepting to the decision of the court upon the questions of law involved, in the trial, in which case the court shall state in writing the conclusions of fact found separately from its conclusions of law.”

Section 4 of chapter 50 of the Compiled Statutes is as follows: “On the hearing of any case arising under the provisions of the last two sections, any party interested shall have process to compel the attendance of witnesses, who shall have the same compensation as now provided by law in the district court, to be paid by the party calling said witnesses. The testimony on said hearing shall be reduced to writing and filed in the office of application, and if any party finds himself aggrieved by the decision in said case he may appeal therefrom to the district court, and said testimony shall be transmitted to said district court, and such appeal shall be decided by the judge of such court upon said evidence alone.”

In *Sprick v. Washington County*, 3 Neb., 255, Judge GANTT, in writing the opinion of the court, says:

"Again it appears from the record that there was no finding by the court in favor of the defendants. It is difficult to discover how a judgment can be maintained without the finding of some fact to sustain it. The finding may be general or special. And, notwithstanding the old settled rules of law, in the determination of actions at law and suits in equity, must, at least in some measure, be observed, yet, under our judiciary system, which recognizes but one form of action called a civil action, it seems clear that the requirements of the Code of Civil Procedure must, so far as applicable, be applied to actions of purely an equitable nature, as well as actions at law. Section 297 of the Civil Code clearly provides that in all actions tried by the court, there must be a general finding, and, when requested by one of the parties, a special finding. * * And if this finding be vague, uncertain, or indefinite, it will not sustain a judgment."

In *Smith v. Silvis*, 8 Neb., 164, it is said, at page 168, in the opinion written by Judge COBB: "The question of partnership was fairly presented by the answer of the Wellses, and it was error in the court to dispose of the case as was done without a finding on that point."

Upon an examination of the bill of exceptions it appears that there were two principal issues tried before the district court, each of which is presented by the remonstrance. These were: That certain of the signers of the petition were not freeholders, and therefore not competent parties to sign the same; and, second, that the applicants had both been guilty of violating the law in the year preceding the application for the license. Had either one of these facts been found against defendants in error, the result would necessarily have been a reversal of the decision of the city council and a refusal of the license. It was therefore necessary that a finding, either general or special, upon these

facts, should be made by the district court in order to sustain the judgment.

It cannot be contended with any degree of success that the finding, if such it should be called, of the district court was upon any question of fact presented by the issues in the case, nor was it general, in favor of defendants in error. It was more a conclusion of law than a finding of fact. The judgment rendered by the district court was in the usual form of judgment in other cases, affirming the decision of an inferior tribunal. It was as follows:

“It is therefore considered and adjudged that the action of the said city council be, and the same is, affirmed, and that the action of the said city council in granting license for the sale of malt, spirituous, and vinous liquors be, and the same is, held valid as to both of said applicants, to which remonstrants except.”

Now, to affirm the judgment—for such it was—of the city council in granting the license, it was as necessary that proper facts should be found, either generally or specially, upon which to base such judgment as in any other case, and we can see no reason why the provisions of the Code applicable to the courts, in the matter of findings and the rendition of judgments, should not be applied to cases of this kind.

But it may be said that a different rule should apply, for the reason that there are no issues regularly formed by the filing of pleadings. This, we apprehend, should make no difference. The law provides in many instances for appeals from inferior tribunals, where no issues are required by pleadings, such as in actions of forcible entry and detention of real property, appeals from assessment of the damages for land taken in the exercise of public domain, either by the state in the opening of public highways or by railroad companies in the condemnation of real estate for right of way, *ad quod damnum* proceedings, etc. In these cases no pleadings are necessary in the district court,

U. P. R. Co. v. Billeter.

yet issues are as clearly defined as in cases where pleadings are actually filed.

There being no finding of facts upon which the judgment of the district court can be based, the judgment is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

UNION PACIFIC R. CO. v. MARKS J. BILLETER.

[FILED JANUARY 7, 1890.]

1. **Fellow-Servants: WHO ARE NOT.** Plaintiff in error was engaged in operating a railroad in this state, and for the purpose of securing the removal of its coal from the coal pockets, in its coal sheds, into the tenders attached to the engines by which its trains were moved, gave an independent contract to one H. to place the coal in the proper pocket prepared by plaintiff in error and from which to load the tender of the locomotives by which the line was operated. He hired his own assistants, paying them out of his own means, by whom alone they were employed and discharged, and to whom alone they looked for their compensation. Defendant in error was employed by him to assist in this work, his duty being to notify the engineers as to the proper position in which their engines should be placed for receiving the coal, and to place the coal in the tender, but in which the engineer rendered no assistance. It was the duty of the engineer to place the engine in its proper place, leaving it stationary until the coal was loaded, but in the discharge of which he received no assistance from defendant in error. It was *held*, that the engineer and defendant in error were not fellow-servants under the rule exempting the railroad company from damages resulting from the negligent acts of fellow-servants.
2. **Contributory Negligence.** The evidence was examined and it was *held*, that the finding of the trial jury, that defendant in error was not guilty of contributory negligence, and that the engineer of plaintiff in error was guilty of negligence, was sustained.

ERROR to the district court for Dodge county. Tried below before MARSHALL, J.

J. M. Thurston, W. R. Kelly, and J. S. Shropshire, for plaintiff in error:

As Billeter and the engineer were in the same employment, for a common purpose, requiring the co-operation of both, they were fellow-servants, and even if the injury did result as charged, defendant in error cannot recover. (*Ill. R. Co. v. Cox*, 21 Ill., 20; *Valtez v. R. Co.*, 85 Id., 500; *Connors v. Hennessy*, 112 Mass., 96; *Johnson v. Boston*, 118 Id., 114; *Harkins v. Sugar Refinery*, 122 Id., 400.) The qualified rule in Ohio: Where different persons are employed in a common enterprise, and one is given no control over the other, neither can maintain an action against the employer. (*Little Miami R. Co. v. Stevens*, 20 Ohio, 415; *Cleveland R. Co. v. Keary*, 3 Ohio St., 201; *Whaalan v. R. Co.*, 8 Id., 249.) The question as to whether or not Billeter and the engineer were fellow-servants should, at least, have been submitted to the jury. (*Mullan v. Steamship Co.*, 78 Pa. St., 25; *Potter v. R. Co.*, 46 Ia., 399; *Wharton, Negligence*, sec. 230.) The testimony shows that Billeter disobeyed his instructions; hence he cannot recover. (*Shanny v. Androscoggin Mills*, 66 Me., 420; *Lyon v. R. Co.*, 31 Mich., 429; *R. Co. v. Thomas*, 51 Miss., 637.)

E. F. Gray, contra:

Billeter and the engineer were not fellow servants, within the rule exempting the master from liability. (*Hitte v. R. V. R. Co.*, 19 Neb., 620; *C. B. & Q. R. Co. v. Clark*, 26 Id., 645; *McKenna v. The Carolina*, 30 Fed. Rep., [N. Y.], 199; *Phillips v. Chicago, M. & St. P. R. Co.*, 64 Wis., 475 [25 N. W. Rep., 544]; *McAndrews v. Burns*, 39 N. J. L., 117; *West v. St. L., etc., R. Co.*, 63 Ill., 545;

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Hale v. Johnson, 80 Ill., 185; *Clarks v. H. & St. J. R. Co.*, 36 Mo., 203; *Fink v. Furnace Co.*, 82 Id., 276; *Reed v. Alleghany*, 79 Pa. St., 300; *Wray v. Evans*, 80 Pa. St., 102; *Shearman & Redfield*, Negligence, sec. 225, and cases cited.) On the question of contributory negligence: *Romick v. C. R. I. & P. R. Co.*, 62 Ia., 167; *Crowley v. B. C. R. & N. R. Co.*, 20 N. W. Rep. [Ia.], 468; *Dilberner v. Chicago, M. & St. P. R. Co.*, 47 Wis., 138 [2 N. W. Rep., 69]; *City of Plattsmouth v. Mitchel*, 20 Neb., 230; *A. & N. R. Co. v. Bailey*, 11 Id., 335; *O. N. & B. H. R. Co. v. O'Donnell*, 22 Id., 475.

REESE, CH. J.

This action was instituted in the district court of Dodge county, and was for damages resulting from personal injuries received by defendant in error while loading coal into the tender of one of plaintiff's engines from a chute or pocket at Valley Station on the line of plaintiff's railroad.

In addition to the usual averments of the corporate capacity of plaintiff in error, it was alleged in the petition that plaintiff in error maintained an apparatus for receiving coal and loading the same into the tenders of the locomotives, called a pocket and apron, said pocket being constructed and used to receive coal, and said apron being constructed so as to carry the coal from the pocket to the tender of plaintiff's engines; the pocket and apron being so constructed as to allow the apron to be let down and suspended over the tender and by which act the door of the pocket became automatically unloosed and the coal was allowed to run from the pocket to the tender of the engine.

"That at and before the committing of the wrongs and injuries hereinafter mentioned one Thomas Hunter, by virtue of an independent contract with said defendant, had the management and control of said apparatus, and of receiving the coal into said pocket and loading the same into said tender by the use of said apron; and by the terms of

said contract he was paid for the management, receiving, and loading aforesaid by the quantity of coal so handled by him in and with said apparatus, and was subject to no control of said defendant therein; and that in order to perform said contract he necessarily employed, controlled, and paid men to do and assist in doing the work, in the performance of said contract on his part.

"That at and before the commission of the wrongs and injuries hereinafter mentioned the said plaintiff was in the employ of said Hunter, independent contractor as aforesaid, and by the duties of his employment was required to operate said apparatus and load said tender with coal from said pocket, using said apron therefor. That on the 22d day of April 1888, the said plaintiff, in the employment aforesaid, while operating said apparatus and loading coal therewith in the said defendant's tender of its locomotive then attached to a freight train, and stopped at said apparatus on the said railroad for that purpose, having discharged a tender load of coal into said tender by said apparatus, he necessarily, without any negligence, wrong, default, or want of ordinary care on his part, stepped upon said tender at the front end thereof to remove from said apron coal remaining thereon, preparatory to swinging said apron into position and out of the way of passing trains, so that said train could move on its own way, when, as said plaintiff was so upon said tender, in the act of removing said coal from the said apron, without any negligence, wrong, default, or want of ordinary care on his part, the said defendant, by its engineer of said locomotive and train, negligently, wrongfully, and without reasonable and ordinary care, suddenly, and without ringing the bell, sounding the whistle, or other notice or warning, started the said locomotive backward, and thereby caught said plaintiff's left leg between the top of the cab of the said locomotive and said apron, and thereby crushed, broke, and injured plaintiff's left leg," etc.

Plaintiff in error filed its answer, by which it admitted

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its corporate capacity, the operation of the railway as alleged in the petition, the construction and operation of the apparatus for receiving coal and loading the same into its locomotive; that the handling of said coal at Valley Station was let by contract to Thomas Hunter, who employed defendant in error, and that defendant in error was not in the employ of plaintiff in error at the time of the accident. Contributory negligence on the part of defendant in error was affirmatively alleged, and negligence on the part of plaintiff in error was denied, as well as the fact of a permanent injury having been suffered by defendant in error.

The reply was a general denial of the affirmative allegations contained in the answer.

A jury trial was had which resulted in a verdict and judgment in favor of defendant in error. The cause is brought to this court by plaintiff in error for review, by proceedings in error.

The evidence submitted to the trial jury on the question of the employment of defendant in error was substantially all to the effect that he was employed by Hunter alone, who was an independent contractor under plaintiff in error; that there was no privity of contract between plaintiff in error and defendant in error, his wages being paid by Hunter, and by whom alone he was employed and liable to be discharged, and to whom alone he was responsible for the manner in which he performed the labor assigned to him. Plaintiff in error requested the court to give to the jury instruction number one, which was as follows:

"The jury are instructed as a matter of law that where a servant is injured in the course of his employment by the negligence of a fellow-servant, the master is not liable to the injured party, and it is not necessary, in order to come within the rule respecting fellow-servants, that the injured party and the one causing the injury should be in the service of the same employer or master, but they may be, as is shown in this case, servants of different masters, and if they

are engaged in the same common business for a common purpose, or for either of the masters, they may be fellow-servants and hence within the rule.

"It is conclusively shown by the testimony that at the time of the injury the plaintiff and the engineer of the engine were engaged in a business for a common purpose, that is, for the benefit of defendant here in the prosecution of its business. That while it was the duty of the engineer to move, place, and operate his engine, it was also the duty of the plaintiff to direct the engineer how and where to place his engine, that is, it required the co-operation of both in order to coal the engine properly. It was necessary for them to work to a common purpose and to a common end in order to transact the business in which they were engaged. This being so they were, in contemplation of law, fellow-servants and as such each was bound to exercise a due regard for the safety of the other, and neither employer would be liable for the injury of one servant caused by the negligence of the other.

"The plaintiff claims that his injury resulted solely through the negligence of the engineer, in permitting the engine to back up as described by the testimony. If you should so find, then your verdict must be for the defendant for the reason above stated."

This instruction the court refused to give and to which plaintiff in error excepted.

The evidence shows that in the proper discharge of his duties, defendant in error notified the engineer of plaintiff which of the pockets containing the coal was the one from which the coal should be removed into the tender; that the engineer stopped the train at the proper place, and after it became stationary defendant in error proceeded to withdraw the coal from the pocket into the tender by the use of the apron above referred to; that while he was doing the work in hand the engineer proceeded to oil his engine, and after the coal had been run from the pocket

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to the tender and while defendant in error was removing from the apron and from the pocket some pieces of coal which had lodged, and which it had become necessary to remove in order to replace the apron so that the engine could be removed and other trains could pass, the engineer reversed the steam by throwing back the reverse lever, in order that he might oil certain portions of the engine, and that by reason of the reverse lever being thrown back the engine, without warning or signal of any kind, ran back, catching the defendant's limb between the apron and the cab of the engine, by which the injury was received. It was the duty of the engineer to place his engine in a proper position and allow it to remain stationary until the coal was placed in the tender, the apron thrown back, and word given to him by the usual and customary signal, without causing the engine to remove from its place. As we have said, it was the duty of defendant in error to notify the engineer as to the place where the engine could be stationed for receiving the coal, that he could then place the coal in the tender without any assistance from the engineer, and, when his duties were performed, to notify the engineer of the fact that he might move on; the engineer being in the employ of plaintiff in error, defendant in error being in the employ of the contractor Hunter.

It is insisted that under these facts the instruction should have been given. We think not. There was no evidence anywhere tending to show that the engineer and defendant in error were in any sense fellow-servants within the legal rule. Without citing any of the many authorities presented by counsel upon either side, we think it is sufficient here to quote a clear statement of this rule, in *Shearman & Redfield on Negligence*, at sec. 225, which is as follows: "Mere co-operation or community of labor and ultimate purpose, is not enough to make men fellow-servants. They are not fellow-servants, unless they are all under the control and direction of a common master. Therefore,

where a servant works side by side with one employed by his master as an independant contractor, or with a servant of such contractor, or the servant of a contractor works with the servants of a sub-contractor, they are not fellow-servants, even though they help to do the same work, for the benefit of the same ultimate employer; and the master of the former servant is therefore responsible for an injury caused by the servant's negligence in such work, either to the contractor or to the contractor's servant." (See also *Young v. R. R. Co.*, 30 Barb., 229; *Gerlach v. Edelmeyer*, 47 N. Y. Super. Ct., 292.) There was no error, therefore, in the refusal to give the instruction asked.

There is no criticism upon the instructions given by the court to the jury, and they need not be here noticed.

It is contended that defendant in error was guilty of contributory negligence, in stepping from the top of the cab to the tool box—which is placed upon the front end of the tender—for the purpose of removing coal from the apron and pocket which had not become entirely disengaged from them prior to his elevation of the apron. It was sought upon the trial to show that the instruction of Mr. Hunter, the contractor, had been to those engaged in that work to refrain from stepping upon the tool box referred to. There was no proof that any instructions of the kind had been conveyed to defendant in error. But upon the contrary it was shown that this was the usual and customary habit adopted for the purpose designated. Plaintiff in error then called witnesses for the purpose of establishing the fact that general instructions of the kind referred to had been issued by Hunter without reference to their having been brought to plaintiff's knowledge. This we infer from the questions propounded to the witnesses. Objection was made upon the ground of the immateriality of the evidence, which was sustained and to which plaintiff in error excepted, but made no offer of the proof of any fact which he proposed to submit to the consideration of

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the court and jury. This was necessary in order to a consideration by this court of the question presented.

It is next contended that the verdict is not sustained by sufficient evidence and that defendant in error was guilty of contributory negligence at the time when he received the injury, of which complaint is made.

The evidence submitted to the jury was in some sense contradictory, yet we think it sufficiently appears that the universal custom was to allow the engine to remain stationary during the time that defendant in error was filling the tender with coal; that there was no reason for him to expect the engine would be removed, and it is clearly shown that the engineer did not contemplate a removal of the engine; that it was not only the custom of defendant in error but of other persons engaged in that employment to step from the top of the cab to the tool box, for the purpose of removing the coal which might accumulate either at the mouth of the pocket or upon the apron, in order that the apron might be thrown back to its proper place; that the accident was caused solely by the act of the engineer in reversing the lever, the movement of the engine being caused by the steam in the steam chest at the time the lever was reversed. While it is quite probable that the engineer was not aware of the presence of the steam in the chest, it is doubtless true that he was aware of the fact that if the steam was present at the time he reversed the lever the necessary result would be a removal of the engine. Whether any effort on his part was made to ascertain as to whether the steam was in the chest or not does not appear; at any rate, he did not satisfy himself that it was not there. The lever was reversed without the knowledge of defendant in error and without his attention being called in any way to the fact, or that there was danger of the engine being moved backward by the action of the engineer. So far as we are able to see he was not in any degree guilty of contributory negligence, but the

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action of the engineer, without giving warning to others, was competent for the jury to consider for the purpose of ascertaining whether or not the accident was caused by his want of due and proper care.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

STATE, EX REL. MARIA C. BEECHER, V. ELEAZER
WAKELEY.

[FILED JANUARY 7, 1890.]

Restraining Order: SUPERSEDEAS: MANDAMUS. Chapter 27 of the Session Laws of 1889, providing for the execution of a supersedeas bond upon the dissolution of a temporary injunction, does not authorize the execution of such bond where, pending an application for the granting of a temporary order of injunction, a restraining order has been issued to the defendant for the purpose of restraining him from a commission of the act complained of until the application for the temporary injunction can be heard; and a writ of *mandamus* will not lie to a judge of the district court requiring him to fix the amount of such bond to be filed by a plaintiff where a temporary order of injunction is refused, notwithstanding a restraining order may have been formerly granted.

ORIGINAL application for *mandamus*.

Wm. E. Healey, and *Thos. D. Crane*, for relator, cited: 2 Joyce, Inj., 1304, 1305; 1 High, Inj. [2d Ed.], sec. 3; 2 Id., secs. 1247, 1271, and citations; *Slayton v. Hulings*, 7 Ind., 144; *Armstrong v. St. Louis*, 3 Mo. App., 151; *Page v. Mayor*, 34 Md., 564; *Fremont v. Crippen*, 10 Cal., 211; *Babcock v. Goodrich*, 47 Cal., 508; *Cal. P. R. Co.*

28	431
45	365
28	431
48	331
28	431
60	518

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v. Cent. P. R. Co., Id., 531; *Price v. Riverside, do.*, Co., 56 Id., 434; *People v. Judge*, 1 Mich., 361; *People, ex rel. La Grange, v. State Treasurer*, 24 Id., 469; *State v. Wright*, 10 Nev., 175; *State v. N. E. R. Co.*, 9 Rich. Law [S. Car.], 247; *People v. Hilliard*, 29 Ill., 413; *Miller v. Mayor*, 47 Ala., 163; Hilliard, Inj., secs. 1-5; 2 Kent Com., 546; *N. W. Mut. Ins. Co. v. Hotel Co.*, 37 Wis., 125; *Audenreil v. Phila. R. Co.*, 68 Pa. St., 375; 2 Story Eq. Jur. [13th Ed.], 873; *People v. Canal Appraisers*, 73 N. Y., 443.

John L. Webster, for respondent, cited: *Hicks v. Michael*, 15 Cal., 107; *Cohen v. Gray*, 70 Id., 85; 2 Daniel, Ch. Pr. [5th Ed.], 1666.

REKSE, CH. J.

This is an application to this court, in the exercise of its original jurisdiction, for a peremptory writ of *mandamus* to the defendant. one of the judges of the district court of Douglas county, requiring him to fix the amount in which a supersedeas bond may be executed by the relator, for the purpose of securing a review of the decision of said judge upon a motion to discharge a restraining order previously made by him in an action then pending in said court in which the relator was plaintiff, and by which she sought an injunction to restrain the officers and agents of the city of Omaha, the Omaha Street Railway Company, the Omaha Motor Railway Company, and Hugh Murphy, from changing the grade of a street upon which relator's property abutted. It is shown by the record that the petition filed in that case was presented to the defendant with a request for an order granting a temporary injunction, when the following indorsement was made thereon by defendant:

"Upon reading the foregoing petition and verification thereof, it is ordered that the hearing of a temporary in-

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junction be set for the 30th day of October, 1889, at ten o'clock A. M., at the court room of the district court of said Douglas county, in the court house thereof, after two days' notice of the same to the defendants, and that in the meantime, and until the further order of this court, a restraining order be granted, as prayed in said petition, upon the plaintiff's executing an undertaking in the sum of \$500 as required by law.

"Dated October 26, 1889.

"By the court:

ELEAZER WAKELEY,

"Judge of the District Court of the said Douglas County."

The undertaking was executed and filed as required by the order above quoted. On the 4th day of November, 1889, the city of Omaha filed its answer, and on the 25th day of the same month the plaintiff filed her reply thereto. On the 11th day of November the cause came on for hearing, when the following order was made:

"On this day came on to be determined the application of the plaintiff for a temporary injunction, which at a former day of this term had been heard pursuant to the order of the court made on October 26, 1889, and taken under advisement, and the court being now fully advised in the premises, it is ordered that the said application be, and hereby is, overruled and denied; to which the plaintiff excepts.

"And that the restraining order, granted pending the said application, be, and hereby is, vacated; to which the plaintiff excepts.

"And thereupon came on to be heard the motion of the plaintiff, that the court fix and determine the amount of the supersedeas undertaking to be given herein, which motion is overruled; to which plaintiff excepts."

It is contended by plaintiff that the duty of fixing the amount of the supersedeas bond is imposed by chap. 27 of the Session Laws of 1889, the first section of which is as follows:

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"Section 1. That in case of the dissolution or modification by any court, or any judge at chambers, of any temporary order of injunction which has been or may hereafter be granted, the court or judge so dissolving or modifying the order of injunction shall at the same time fix a reasonable sum as the amount of the supersedeas bond which the person or persons applying for said injunction may give and prevent the doing of the act or acts the commission of which was or may be sought to be restrained by the injunction so dissolved or modified."

Section 3 of the same chapter is as follows:

"Sec. 3. Such supersedeas bond shall stay the doing of the act or acts sought to be restrained by the suit, and continue such injunction in force until the case is heard and finally determined by the judgment, decree, or final order of the court * * *"

Section 253 and section 254 of the Civil Code in the chapter providing for injunctions are as follows:

"Sec. 253. If the court or judge deem it proper that the defendant or any party to the suit should be heard before granting the injunction, it may direct a reasonable notice to be given to such party to attend for such purpose at a specified time and place, and may in the meantime restrain such party.

"Sec. 254. An injunction shall not be granted against a party who has answered unless upon notice, but such party may be restrained until the decision of the application for an injunction."

The question now here presented is whether or not the restraining order which was allowed by the defendant, on the 26th day of October, pending the application for an injunction, the hearing of which was set for a specified time, and for which notice was required to be given to the defendants in the action, was an injunction within the meaning of chapter 27 of the laws of 1889 above quoted.

In construing sections 253 and 254 of the Code, the con-

sideration of section 251 becomes necessary. This section provides, in substance, that, if it appears by the petition that the plaintiff is entitled to the relief demanded, and that such relief or any part thereof consists in restraining the commission or continuance of some act the commission of which or continuation of which during the litigation would produce great or irreparable injury to the plaintiff, or when during the litigation it appears that the defendant is doing, or threatens, or is about to do, some act, in violation of the plaintiff's rights respecting the subject of the action, and which tends to render the judgment ineffectual, a temporary injunction may be granted to restrain such act.

By the petition which was filed by the plaintiff in that action, the relief demanded was a perpetual injunction against the defendants therein, enjoining them from molesting the street. The decree granting the injunction could not be rendered until upon final trial; but for the purpose of preventing the injury, it is provided that a temporary injunction may be granted for the purpose of restraining the commission of the act until the cause can be finally heard. This temporary order of injunction was sought when the petition was presented to the defendant and the allowance thereof asked. As shown by his indorsement upon the petition, he declined to grant the temporary injunction without notice having been served upon the defendants in the action and an opportunity given them to show cause why such injunction should not be granted. This course is provided for by section 253 above quoted, but as some time must necessarily be consumed in serving the notice and in preparing for the hearing of the application for the temporary injunction, the defendant, acting under the provisions of the latter clause of section 253, issued an order restraining the defendants from the commission of the act complained of pending the application for the temporary injunction. This provision of the statute is intended for the protection of the rights of the plaintiff, prior

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to the granting of the temporary injunction provided for by section 251, and while it in some degree partakes of the nature of an injunction, yet it is purely transitory and has not within itself the elements necessary for its continuance. Upon a decision either granting or refusing the temporary injunction, its vitality is gone, and it ceases to be binding upon the defendants in the action.

A question similar to the one here presented was before the supreme court of California in *Hicks v. Michael*, 15 Cal., 107, under a statute very similar to the sections of the Code above quoted, and in the opinion written by Chief Justice Field, in which the question was quite carefully considered, the same conclusion was arrived at as expressed herein, and in which it is said by the learned Chief Justice :

"It follows that no injunction was granted in the case, but expressly refused. The appeal, then, which plaintiff has taken, or proposed to take, is only from an order refusing an injunction, and the simple question is presented whether an appeal from an order of this character can operate to create an injunction or to prolong a restraining order until the ruling of the judge can be reviewed by the appellate court. It is clear that no such effect can be given to an appeal even when the most ample bond of indemnity is tendered. Where an injunction has been refused, there is nothing operative. A stay can only be sought of that which has an existence, and by its operation is supposed to work injury to the appellant."

It is contended by plaintiff that the California case is not authority here, for the reason that restraining orders are granted in that state without bond, and for the further reason that the writ of injunction is there in force, while the writ of injunction is abolished in this state. Where the order of injunction is not allowed at the commencement of an action, in this state, it partakes of all the essential elements of the writ of injunction, and it is provided by section 256 that the order shall be addressed to the party enjoined, and

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shall state the injunction, and be issued by the clerk. It is simply a matter of form and not of substance. The statutes of this state do not provide in terms for the execution of a bond of indemnity when a restraining order is issued, pending an application for an injunction, yet we have no doubt of the right, and indeed of the duty of a judge when granting a restraining order, to require that the party against whom the order is issued shall be indemnified against loss resulting therefrom. It is very clear that the legislature never intended to give the force and effect to a restraining order which attaches to an injunction when regularly allowed. It simply suspends proceedings until an opportunity can be given for the parties to be heard, and upon that hearing having been had, and a decision rendered upon the application, the whole force of the restraining order ceases by its own limitation. Any other conclusion would do violence to the intention of the legislature. If the contention of the plaintiff should prevail, it would enable a plaintiff in an injunction proceeding, upon a representation to a judge, by a petition, and such other methods as might be adopted, that great and irreparable injury would result from a failure to issue an immediate injunction, to procure the restraining order mentioned by the statute, and then, in spite of the judge and the court before which the case was heard, and even over an order directly refusing to grant an injunction, prevent the commission of the act until the case could be finally heard in the appellate court, which was clearly not the purpose of the act of 1889.

The writ is therefore denied.

WRIT DENIED.

THE other judges concur.

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28	438
34	44
28	438
37	306
28	438
55	169

STATE, EX REL. GEORGE H. FAIR, V. KELLEY W.
FRAZIER.

[FILED JANUARY 7, 1890.]

1. **Quo Warranto: OTHER REMEDIES CUMULATIVE.** In an action upon an information, in the nature of *quo warranto*, wherein it is claimed that the relator and plaintiff was elected to the office of county attorney, and the defendant had, during the term, intruded and usurped the said office, *held*, that the provisions of the election law entitled "Contesting Elections" is cumulative, and is not an exclusive remedy.
2. ———: **COMPLAINANT MAY INSTITUTE.** In such action, the information may be filed by the complaining party when, if brought in the supreme court, the attorney general, or, if in the district court, the county attorney, having been requested, shall refuse to appear and file it.
3. ———: **SUPREME COURT: JURISDICTION.** The supreme court has original jurisdiction in an action in the nature of *quo warranto* to determine conflicting claims to a public office.
4. ———: **SERVICE OF WRIT.** A writ issued by the supreme court, or under its authority, may be legally served in any county in the state.
5. **Indians: CITIZENSHIP.** Under the provisions of the first clause of section 6 of the act of congress entitled "An act to provide for the allotment of lands in severalty to Indians," etc., approved February 8, 1887, in order to establish an Indian's right to citizenship, and hence to vote at an election in this state, *held*, that it must be proven that such Indian was born within the territorial limits of the United States, and that an allotment of land, in fact, has been made to such Indian by the government of the United States in pursuance of said act, or of like authority of law, or treaty of the United States.

ORIGINAL action in nature of *quo warranto*.

J. B. Barnes, Mell C. Jay, and John T. Spencer, for relator :

The supreme court has jurisdiction of the subject-matter and of the person of respondent. (Const., art. 5, sec. 2; *State*

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v. Allen, 5 Kan., 213; *State v. Wilson*, 30 Id., 661.) The statutory remedy by contest is merely cumulative. (Comp. Stats., ch. 71; *Kane v. People*, 4 Neb., 509, 513; *State v. Grif-fey*, 5 Id., 161; *State v. Stein*, 13 Id., 530.) Indians are aliens, acknowledging no allegiance to state laws and exempt from taxation thereby. (*Cherokee Nation v. Georgia*, 5 Pet. [U. S.], 1; *Worcester v. Georgia*, 6 Id., 515; *U. S. v. Rogers*, 4 How. [U. S.], 567; *U. S. v. Holliday*, 3 Wall. [U. S.], 407; *Case of Kansas Indians*, 5 Id., 737; *Elk v. Wilkins*, 112 U. S., 99.) Their alien character cannot be divested at their own election; they can be made citizens only by act or assent of congress. (*Wilson v. Wall*, 6 Wall. [U. S.], 83; *Gray v. Coffman*, 3 Dill. [U. S.], 393; *Hicks v. But-rick*, Id., 413; *Elk v. Wilkins*, *supra*; *U. S. v. Osborne*, 6 Sawyer [U. S.], 406, 409; *U. S. v. Joseph*, 94 U. S., 614, 618.) Indians on a reservation are not citizens, but inde-pendent tribes. (*Goodell v. Jackson*, 20 Johns. [N. Y.], 693; *Holden v. Joy*, 17 Wall. [U. S.], 211; *Strong v. Waterman*, 11 Paige [N. Y.], 607.) They are subjects merely. (7 Opinions of Attys. Gen., 749.) The petition upon which the so-called Winnebago precinct was formed, was not signed by a majority of the legal voters as required, and the proceeding is void. (*Robinson v. Mathwick*, 5 Neb., 255; *Doddy v. Vaughn*, 7 Id., 31; *Cheney v. Dakota County*, 22 Id., 437.) When but one mode of action is prescribed for the board, all others are excluded. (*Stewart v. Otoe County*, 2 Neb., 177; *S. C. & P. R. Co. v. Washing-ton County*, 3 Id., 42; *People v. Com'rs*, 4 Id., 157.)

• *Davis & Gantt*, for respondent:

As the relator is a private individual, the district court for the county where he resides has exclusive jurisdiction. (*Lowes v. Thompson*, 34 Ohio St., 365.) As the provisions of our law relative to *quo warranto* were taken from the Ohio Code, the above case is conclusive here. (*Franklin v. Kelly*, 2 Neb., 104; *Tyler v. Tyler*, 19 Ill., 151; *Drennan*

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v. People, 10 Mich., 175, 177; *Harrison v. Sager*, 27 Id., 476; *Daniels v. Clegg*, 28 Id., 33; *Favint v. Booth*, 17 O. S., 153; *Draper v. Emerson*, 22 Wis., 150.) The Nebraska cases cited by relator do not decide the question of jurisdiction, and the Kansas cases are based upon a statute different from ours. Relator has an adequate remedy at law which is exclusive and deprives the supreme court of jurisdiction in this case. (McCrary, Elections [2d Ed.], sec. 285a; *Dickey v. Reed*, 78 Ill., 261; *Moore v. Hoisington*, 31 Id., 243; *Bell v. Templin*, 26 Neb., 249; *State v. Oleson*, 15 Id., 247; *State v. Marlow*, 15 Ohio, St., 114; *Wetmore v. Stewart*, 26 Id., 216.) Naturalization may be accomplished under the general law providing therefor or by a special act of congress. (*Dred Scott v. Sanford*, 19 How. [U. S.], 393; *People v. Washington*, 36 Cal., 658.) The rights of citizenship were conferred upon the Winnebagoes by the Dawes act of 1887, and all the members of the tribe who voted at this election had either received their lands in severalty or were children of those who had done so.

COBB, J.

The attorney general having declined to appear for the state, the relator brought his original petition in *quo warranto* against Kelley W. Frazer, of Dakota county, alleging that he is a citizen of the United States, and of the state of Nebraska, and a duly qualified elector and resident of the county of Dakota, in said state, and was such on the 6th day of November, 1888, and at that time possessed all the qualifications required by law to enable him to hold the office of county attorney in and for said county.

He further alleges that the election was held on the 6th day of November, 1888, in said county of Dakota, and in accordance with the provisions of law, at which election relator was a candidate for said office in said county, and within the proper and legal limits and boundaries of said

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county received 714 votes for said office; that defendant was also a candidate for said office, and within said limits and boundaries received 627 votes, and no more; that relator received a majority of the votes cast at said election within said county of Dakota, amounting to 87 votes, and was therefore duly and legally elected to said office for the ensuing two years.

Further alleges that lying south of and contiguous to the said county of Dakota there is a certain territory and tract of country comprising about seven townships of land, known as and called Omaha and Winnebago reservation; that said tract of country was set apart and ceded to the said tribes or nations of Indians by an act of congress and by treaty with said tribes of Indians, which treaty and act was ratified and confirmed on the 21st day of June, 1854; that said tribes or nations of Indians since said date have owned, occupied, and possessed said tract of country, and still own and possess the same as their reservation and permanent home; that said tribes are in charge of and under the custody, care, and control of an agent, appointed by the president of the United States, who is in charge of the agency on said reservations, established and maintained under the laws of the United States.

Further alleges that the Winnebago tribe or nation of Indians has not abandoned its tribal relations, but still keeps up and maintains the same; that they have not adopted the habits of civilized life, and taken their lands in severalty, nor received patents therefor; that they had not done so prior to the said 6th day of November, 1888, as provided by the act of congress known as the Dawes bill, passed and approved February 8, 1887; that none of said Winnebago tribe or nation of Indians were citizens of the United States, and none of the members of said tribe were citizens of the state of Nebraska, and are not and were not electors of the county of Dakota on the 6th of November, aforesaid, and were not entitled to vote in the

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said county of Dakota, nor for any candidate for the office of county attorney of said county; that of the Omaha tribe or nation of Indians who claimed to have taken their lands in severalty, and who have received patents therefor, and who claimed to be citizens of the United States, under and by virtue of the act of congress, aforesaid, there were twenty-eight who voted on the said 6th day of November, 1888.

Plaintiff further alleges that the legislature of the state of Nebraska, held during the year 1879, passed an act pretending, or attempting, to attach said reservation to the said county of Dakota for election, revenue, and judicial purposes, and claims that said act is unconstitutional and void.

Plaintiff further alleges that twelve days preceding the day of election there was presented to the board of commissioners of Dakota county a petition asking and praying the board to establish a voting precinct or polling place at the government agency, aforesaid, to be known as and called Winnebago precinct, which petition was signed by only twenty-one persons, eight of whom were government employes, temporarily staying on said agency, in the employ of the United States; that the board of commissioners established the precinct or voting place, as prayed for, under the name of Winnebago precinct; that no precinct officers were appointed or elected for said precinct previous to November 6, 1888; that the county clerk of the county of Dakota—said county not being under township organization—did not make out and deliver, twenty days prior to the holding of said election, nor at any other time, a notice of said election, to be posted in said precinct; that no notice of such election was ever posted by the sheriff in said precinct, and that said precinct was not formed in time to have notices of election posted ten days prior to the time of holding said election, as provided by law; and claims that all the proceedings in relation to the establishing of said precinct were illegal and void, and conferred no right

or authority upon any of the inhabitants of said precinct to vote at said election; that 250 votes for the office of county attorney were cast at said precinct by the Winnebago and Omaha tribes of Indians, and the government agents and employes stopping at said agency; that of this number defendant received 193 votes and the relator 57 votes; that said votes were counted and returned to the county clerk and were canvassed by the board of canvassers of said county, which gave defendant a majority of 49 votes; that defendant was wrongfully and unlawfully declared elected to the office of county attorney, in and for Dakota county, for the ensuing two years, and the certificate of election was issued and delivered to him by the clerk of Dakota county.

Further alleges that J. F. Warner, the agent in charge of said Indians, his son, M. M. Warner, one William Hedges, A. H. Baker, McCuin, Fitzpatrick, and other government employes amounting to twelve persons, temporarily residing at and having charge of said agency, wrongfully and fraudulently voted at said polling place for the defendant, and their votes were canvassed and returned for the defendant without any authority of law.

Further alleges that at St. John's precinct, at said election, ten illegal votes were cast and counted for defendant.

Further alleges that the relator, at the election aforesaid, received a majority of all the legal votes cast at said election, and was duly and legally elected to the office of county attorney, of said county, for the period of two years from the 3d day of January, 1889; that the relator duly tendered his official bond to the proper authority, and demanded possession of said office from defendant, and defendant refused and still refuses to deliver possession of the office to relator.

Prays judgment that the defendant be declared not elected to said office; that he be ousted therefrom and the relator be declared entitled to the same and installed therein.

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To this information defendant files his answer and alleges:

First—That he was not at the commencement of this action a resident of, nor within the county of Lancaster, nor was a service of summons had on him therein.

Second—That the action was brought against defendant by a private individual, and not by the attorney general of the state; that in actions of *quo warranto* brought on the relation of a private individual the district court of the county in which defendant resides has exclusive jurisdiction; that the defendant is a citizen of and resides within Dakota county; that no service of summons has been made within Lancaster county, nor has said defendant accepted service within said Lancaster county, for reason of which this court has no jurisdiction to try the case.

Further alleges that plaintiff has a full, complete, and speedy remedy at law. Further answering, admits that plaintiff is an elector and resident of Dakota county, and has the qualifications necessary to hold the office of county attorney.

Answering to the second count, admits that the election was held on the 6th of November, 1888, and that plaintiff and defendant were opposing candidates for the office of county attorney. Denies each and every other allegation in said count contained.

Answering third count, denies each and every allegation therein contained, and further answering to said count alleges that by an act of congress approved February 21, 1863, it became the duty of the secretary of the interior to allot to said Indians in severalty lands which they may respectively cultivate and improve, not exceeding eighty acres, to each head of a family other than chiefs, to whom larger amounts may be made, which lands when so allotted shall be vested in said Indians and their heirs without the right of alienation, and shall be evidenced by patent; said act further provided said Indians should be subject

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to the laws of the United States and the criminal laws of the state or territory in which they may happen to reside; that said Indians, in accordance with the treaty made March 8, 1865, were removed to the state of Nebraska, and to the lands which they now occupy, and which lands are part of the same out of which said Winnebago precinct was created; that afterwards in pursuance of said act and treaty, and on the 22d of November, 1872, patents were issued to said Indians as provided in said act for said lands, which patents included a part of the lands out of which said precinct was formed, and upon which the Winnebago Indians, who voted for defendant at the November, 1888, election, resided at said time and did so reside thereon for a long period preceding said election after receiving their patents. Further answering said count, alleges that by an act of congress approved August 7, 1882, and relating to the Omaha tribe of Indians, it was provided in the said act that certain lands therein described should be allotted in severalty to said Indians, and after approval of said allotments by the secretary of of the interior said secretary should cause patents of said lands to be issued to said Indians; that upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of said tribe of Indians shall have the benefit of and be subject to the laws, both civil and criminal, of the state of Nebraska, and that said state shall not pass and enforce any law denying any Indians in said tribe the equal protection of law; that in pursuance of said act allotments were made of said lands to said Indians on the 29th of December, 1884, patents were issued therefor as provided in said act; that the said patents included the land upon which the Omaha Indians, who voted at the November, 1888, election, reside, and the same is within a part of the Winnebago precinct aforesaid; and that said Indians have been, and at the time of the election and for a number of years previous thereto, residents of the land located and within said precinct. Further answering

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said count defendant alleges that by an act of congress approved February 8, 1887, it was provided in section 6 of said act that upon the completion of said allotments and the patenting of the lands of said allottees, each and every band or tribe of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, in the state or territory in which they may reside. And no state or territory shall pass or enforce any law denying any such Indians within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotment shall have been made under the provision of this act, *or under any law or treaty*, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribes of Indians therein, and adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not by birth or otherwise a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property. Defendant further alleges that of about 190 votes cast for him at said election in said Winnebago precinct by the Omaha and Winnebago Indians aforesaid, all of said votes were cast by Indians who had severed their tribal relations, taken their lands in severalty, received patents therefor and adopted the habits of civilized life, and at the time of said election, and long previous thereto, were residing on and cultivating said lands and dependent upon their own labor for a livelihood, and received no aid from the government whatever excepting the annuity paid them that was derived from the sale of Minnesota lands and did not exceed the amount of \$15 a year for each individual; that all of said Indians voting for defendant had resided in the state of Nebraska

for more than six months, in Dakota county for more than sixty days, and in Winnebago precinct for more than ten days preceding said election, and under and by virtue of the act approved February 8, 1887, said Indians were citizens of the United States and the state of Nebraska, and had full right to exercise the right of suffrage in said county and precinct and their votes were legally and properly received canvassed and counted for this defendant for the office of county attorney of said county.

Answering fourth count, admits that the legislature of the state of Nebraska, at the session held during the year 1879, passed an act attaching said territory to the county of Dakota for election, judicial, and revenue purposes; admits that the same became a law on the 27th of February, 1879; denies that the said act was unconstitutional and void, and avers the fact to be that said act is and was at the time of holding the election aforesaid a valid and subsisting law.

Answering fifth count, denies each and every allegation therein contained, except as hereinafter expressly admitted; avers the facts to be that the action of said board was based on three different petitions presented to them praying that they set off said territory as a voting precinct; that said petitions were signed by some 247 of the residents and voters of the territory in said petitions described, as is fully shown by copies of said petitions attached to the answer; that on the 23d of October, 1888, in pursuance of said petition, the commissioners created a precinct by the name of Winnebago precinct and the votes complained of were cast in said precinct for said office of county attorney, and other officers voted for at the general election, and said election was held in all respects in conformity to the laws governing elections. Further answering said count, defendant says that said precinct was formed from the territory attached to the county of Dakota by the act of the legislature passed and approved February 27, 1879, and that since the passage of said act, and up to the time of the

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action of the commissioners as aforesaid, no precinct or voting place had been formed for the benefit and convenience of the voters residing on the territory so attached; that voters up to the time of formation of said precinct had to go a great distance at much inconvenience to exercise the right of suffrage; that said board of commissioners had full power under the law relating to the formation of new precincts to act in the premises, and under said law it was their duty to form a voting precinct for the accommodation of the voters residing in said territory without any petition therefor. Defendant alleges that notices were posted in said precinct for more than ten days preceding said election; that had no notice been posted in said precinct it would have no effect upon the legality of the votes cast; as the time of holding said election is fixed by law, and that all of the 193 votes cast, canvassed, and returned for defendant at said voting precinct were legal and valid votes cast by *bona fide* residents of said precinct, and said residents were citizens of the United States and the state of Nebraska, and had a right to vote at said election in said precinct for candidates for the various offices to be filled at said election.

Answering sixth count, denies that J. F. Warner and other parties therein mentioned were temporarily residing on said reservation; denies that said persons fraudulently and wrongfully voted; denies that said votes were wrongfully and unlawfully canvassed for defendant; avers the facts to be that said parties had resided on said reservation and made their permanent home on the same for a long period previous to the time of their voting, and had been residents of the state of Nebraska for more than six months, and had resided in the county of Dakota for more than sixty days, and in said precinct for more than ten days preceding the said election, and had full right as citizens of Nebraska and residents of said county and precinct for the requisite time to vote at said election.

In answer to the seventh count, denies that certain votes were cast in said precinct for plaintiff, which were not counted. Further answering, says that of the six Indians who voted in said precinct this defendant has no knowledge or information as to whether said Indians had the right to vote in said precinct or not, and has no knowledge or information as to whom said Indians voted for, but is informed and believes it to be true that said Indians cast their votes for the plaintiff, and said votes were canvassed and counted for the plaintiff by the canvassing board of said precinct.

Answering eighth count, denies each and every allegation therein. For further answer to the information of the relator, alleges that at the election held in Dakota county, Nebraska, on the 6th of November, 1888, for the office of county attorney of said county, defendant received 820 votes, and the relator received 771 votes; that defendant was duly declared elected to the office of county attorney, and received a certificate of election, duly qualified; filed the bond required by law, and entered upon the duties of said office at the time required by law, and has ever since, and now is performing the duties of said office, and is lawfully and legally entitled to said office for the term of two years; denies that the relator was elected to said office of county attorney of Dakota county, or has any right or claim thereto. Defendant prays that said office and its privileges and franchises may be adjudged to him and for his costs.

To this answer plaintiff for reply alleges that the supreme court of the state of Nebraska has original jurisdiction of the subject-matter of this action and the parties thereto, and the district court of Dakota county has not exclusive jurisdiction of this matter; that defendant accepted service of the summons of this court in this cause, and has duly appeared and answered to the merits of this action; that the relator had not at the time of the com-

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mencement of this action an adequate remedy at law. Relator admits that under the provisions of the act of congress, approved February 21, 1863, and of the treaty approved March 8, 1865, as alleged in the answer, the Winnebago Indians removed to the state of Nebraska, and to the lands which they now occupy; and alleges that of the Indians that voted at the election in Winnebago precinct on the 6th day of November, 1888, but 34 had received patents under the provisions of the act of congress and the treaty aforesaid, and of the 34 Indians thus voting but 7 had received and retained patents to their allotments made as aforesaid, and all other Winnebago Indians who voted at said election voted by virtue of the allotments made under the provisions of the act of congress approved February 8, 1887, and made subsequent to said date by a special agent of the government, which allotments had not been on the 6th day of November, 1888, approved by the government of the United States, and patents issued therefor; relator further admits that the Omaha tribe, or nation of Indians, were entitled to vote at the election held on the 6th day of November, and further alleges that less than thirty of said tribe voted at said pretended precinct for the candidate for the office of county attorney of Dakota county.

Further replying, relator admits the provisions of the act of congress, approved February 8, 1887, as in said answer alleged, but denies that the Winnebago Indians who voted in said precinct had taken their lands in severalty, and received patents therefor; denies that said Indians had severed their tribal relations and adopted the habits of civilized life; denies that they are dependent upon their own labor for a livelihood and receive no aid from the government except the annuities derived from the sale of their lands in Minnesota; denies that said Indians became citizens by virtue of the act approved February 8, 1887; denies that they were legal voters on the 6th

of November, 1888; denies that the votes cast by said Indians were legally and properly cast and counted for defendant therein; alleges that said Indians are under the care and control of the agent appointed by the government of the United States; that through said agent they receive aid from the government of the United States in the matter of annuities and supplies; that they are not now and never have been since their settlement in Nebraska self-supporting; their farms are stocked, their buildings erected, and seeds, grain, and implements furnished them by the government; that they maintain the customs and usages of the said Winnebago tribe, preserve their own peculiar mode of life in regard to their habitation and living, and are not and never have been amenable to the laws of said state; that they are not now, and were not on the 6th of November, performing the duties of citizens of the state of Nebraska; that they were fraudulently voted in said precinct, and said votes were fraudulently and unlawfully received, counted, and canvassed for the various county and state offices, and that none of the 210 Winnebago Indians, who voted in said precinct, were electors of the state of Nebraska, or entitled to vote at said election.

For further reply to said answer, denies that said precinct was established upon three petitions, but alleges the fact to be that the petition marked Exhibit A and the petition marked Exhibit C were filed at or near the same time they were fraudulently joined together, and were rejected by the board of county commissioners on the 21st day of October, 1888; that on the 16th of October a petition, marked Exhibit B, was filed in the office of the clerk of said county, and on the 23d day of October, 1888, the precinct was established as prayed for in said petition; that J. F. Warner, M. M. Warner, Wm. Hedges, Fitzpatrick, McCuin, A. H. Baker, and John W. Nunn were government employes, and are not, and were not at the time they signed said petition, *bona fide* electors and resi-

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dents of said precinct, but were residing on said reservation for the purpose of their employment only; that M. J. Fitzpatrick and Wm. Hedges, who made the affidavit to said petition, and were signers thereof, were government employes at the time of signing said petition and making the application aforesaid. That the acts of the board of commissioners of Dakota county, in establishing such precinct, were illegal and void, and conferred no right or authority upon any residents of said precinct to vote at said election. Admits that said precinct was formed from the territory which the legislature of the state of Nebraska, by act approved February 27, 1879, attached to said county; but denies that notices of said election were posted in said precinct ten days before said election, or at any other time; denies any part of the 193 votes cast for said defendant, by the said Winnebago Indians, or by said government agents and employes, in said precinct, were legal votes; denies that said Indians and government agents and employes had the right to vote at said election; denies that J. F. Warner, M. M. Warner, A. H. Baker, M. J. Fitzpatrick, W. A. McCuin, William Hedges, and John W. Nunn were residents and electors of said precinct. Alleges that they were residing there for the purpose of said appointment, and had no right to vote in said precinct for any candidate.

Further replying, denies that the defendant received a majority of the legal votes cast at said election for the office of county attorney, or that he received 820 legal votes. Alleges that the votes so counted and canvassed for the defendant included the 193 votes of the said Winnebago Indians and the government agents and employes in said precinct, and that this relator received a majority of eighty-seven of all the legal votes that were cast at said election; that he was duly and legally elected to the office of county attorney of Dakota county, for a term of two years from the 3d day of January, 1889.

There are three important questions presented by the record in this case: First, as to the procedure. This branch of the case presents questions: First, the jurisdiction and power of the supreme court to hear and determine original actions of *quo warranto*; to inquire by what right a respondent holds a county office.

Article 6 of the constitution of the state is devoted to the judicial department, and section 2 thereof to the supreme court, and provides as follows: "It shall have original jurisdiction in cases relating to the revenue, civil cases in which the state shall be a party, *mandamus*, *quo warranto*, *habeas corpus*, and such appellate jurisdiction as may be provided by law."

Section 1 of chapter 71 of the Compiled Statutes provides that "When any citizen of this state shall claim any office which is usurped, invaded, or unlawfully held and exercised by another, the person so claiming such office shall have the right to file in the district court an information in the nature of a *quo warranto* upon his own relation, and with or without the consent of the prosecuting attorney, and such person shall have the right to prosecute said information to final judgment; *Provided*, He shall have first applied to the prosecuting attorney to file the information, and the prosecuting attorney shall have refused or neglected to file the same."

Section 4 of said chapter provides that "Proceedings in the supreme court in applications for *mandamus* shall be regulated by chapter 3 of title 18 of the Code of Civil Procedure, in applications by *quo warranto* by title 23 of said Code, and in application for *habeas corpus* by chapter 25 of the Criminal Code; and all other provisions of law relating to those remedies shall be applicable to said proceedings when had in said court exercising its original jurisdiction."

Section 5 provides that "The several district courts shall have and exercise concurrent jurisdiction with the supreme

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court in the several kinds of action enumerated in the foregoing section and the mode of proceeding and the practice relating thereto shall be the same as that obtaining in the supreme court as herein provided and as now provided by law."

Title 23 of the Code of Civil Procedure provides as follows:

"Sec. 704. An information may be filed against any person unlawfully holding or exercising any public office or franchise within this state, or any office in any corporation created by the laws of this state, or when any public officer has done or suffered any act which works a forfeiture of his office, or when any persons act as a corporation within this state without being authorized by law, or if, being incorporated, they do or omit acts which amount to a surrender or forfeiture of their rights and privileges as a corporation, or when they exercise powers not conferred by law.

"Sec. 705. Such information may be filed by the prosecuting attorney of the proper county whenever he deems it his duty so to do.

"Sec. 706. He must file such information when directed to do so by the governor, the legislative assembly, or the district court."

The remaining sections are devoted to matters of detail.

When these provisions of law are grouped and considered together, it is clear that the supreme court has jurisdiction of the case at bar, a jurisdiction derived from the constitution which no statute could take away, and of which no statute has sought to deprive it. It is equally clear that the relator, having applied to the attorney general to file said information and that officer having refused, had the right to file it himself. That the respondent, being a citizen and resident of Dakota county, cannot be sued in the supreme court which holds its sessions and keeps its records in Lancaster county, and can

a summons issued by the clerk of said court in Lancaster county be served on the respondent in Dakota county and thereby confer jurisdiction of the person of respondent upon said court? The supreme court has no other or greater jurisdiction in the county of Lancaster than it has in the county of Dakota, or any other county of the state. Any writ that may be issued under its authority may be served in any county of the state, and no question of local citizenship, or domicile, can grow out of the fact of such service being made in one county rather than another. These propositions are so self-evident, and the conclusions so irresistible, that any analysis, or discussion, of them is deemed superfluous. No purpose would be served by a discussion of the case of *State, ex rel. Lowes, v. Thompson*, 34 O. S., 365, cited by counsel for respondent. We are all of the opinion that that case cannot be followed in this state.

Counsel for respondent cite section 60 of the Code of Civil Procedure, which reads as follows: "Every other action must be brought in the county in which the defendant, or some of the defendants, resides, or may be summoned." This section is part of title IV of the Code, which is entitled "The county in which actions are to be brought." The nine sections of said title occurring before the section now under consideration are devoted to actions of which the district courts have exclusive original jurisdiction, and the three that follow are devoted to provisions for a change of venue in causes in the district courts, and the transfer of such causes from the district court of one county to that of another. These provisions, including those of section 60, must be held to apply exclusively to proceedings in the district courts, except where, by other provisions of law, proceedings in other courts are made applicable to them. It would be contrary to the spirit of our laws to accord to the supreme court a jurisdiction in one county denied to it in all the

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rest, or to limit the running of its writs and process to the county in which the court holds its sessions and keeps its records and office of its clerk.

The next point raised by the respondent and discussed in the brief of counsel is to the effect that the relator should be denied his remedy by *quo warranto*, for the reason that he has an adequate remedy at law.

The case of *Kane v. The People*, 4 Neb., 509, would seem to be decisive of this point in favor of the relator. But counsel for the respondent contends that the force of this opinion is weakened, if not broken, by the fact that in the constitution of 1875 there is no express grant of common law and chancery jurisdiction to the supreme court. It is true that a part of the argument of the learned judge, who delivered the opinion of the court in that case, was based upon the provision of the constitution of 1867, giving to the supreme and district courts both chancery and common law jurisdiction. Yet it is observed that his conclusion was foreshadowed and manifest from his argument before he reached that part of the decision.

Section 64 *et seq.* of chapter 26 of the Comp. Stats. entitled "Elections" provides for contesting elections; section 70 gives the district courts of the respective counties power to hear and determine contests of the election of county judge and in regard to the removal of county seats, etc., and section 71 provides that "The county courts shall hear and determine contests of all other county, township, and precinct officers," etc. This embraces county attorneys. The statute, nowhere, in terms, makes these provisions exclusive of all other remedies. So that if they are to be so considered, it must be by force of that general proposition so often invoked, and laid down with more or less accuracy, that neither injunction in equity, nor *mandamus* at law, can be resorted to where the party aggrieved can obtain full and adequate relief in the usual course of proceedings at law, or by the ordinary forms of civil action. Mr.

High, in his work on Extraordinary Legal Remedies, at sec. 617, says that "A striking analogy exists between the remedy by *quo warranto* information and the extraordinary remedies" above referred to. He also lays down the rule that "where a specific mode is provided by statute, * * * and a specific tribunal is created for that purpose, and the method of proceeding therein is fixed by law, resort must be had to the remedy thus provided, and proceedings by information in the nature of a *quo warranto* will not be entertained." The author cites to the above: *State v. Marlow*, 15 Ohio S., 114; *State v. Taylor*, Id., 137; *Commonwealth v. Henszey*, 81* Pa. St., 101; *People v. Every*, 88 Mich., 405; *State v. Wadkins*, 1 Rich. (S. Car.), 42; *People v. Whitcomb*, 55 Ill., 172; *People, ex rel., v. Ridgley*, 21 Ill., 66; *Dart v. Houston*, 22 Ga., 506; *People v. Hillsdale & Chatham Turnpike Co.*, 2 Johns., (N. Y.), 190. I have examined all of the above cases except *People v. Whitcomb*, 55 Ill., which I do not find in the library, and do not find any one of them to sustain the text, with the exception of *State v. Marlow*, 15 Ohio State R., which is the case discussed by Judge LAKE in *Kane v. The People*, *supra*.

I am therefore of the opinion that the remedy by contest under the provisions of the statute above cited, in cases like the one at bar, is a cumulative and not an exclusive one, and that the objections to the procedure by *quo warranto* and to the jurisdiction of this court to hear and determine it must be overruled.

I will pass over, at least for the present, the consideration of the act of the legislature by which it was sought "To attach a portion of what is known as the Winnebago and Omaha reservations in the state of Nebraska to the county of Dakota for election, judicial, and revenue purposes," also the question of the legality of the organization of Winnebago precinct in said county, and proceed to the consideration of what is conceded to be the main question in the case—the right of the Winnebago Indians to

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vote at the election at which the relator claims to have been elected.

By the constitution of this state, article 7, section 1, "Every male person of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the state six months, and in the county, precinct, or ward for the term provided by law, shall be an elector: First, citizens of the United States. Second, persons of foreign birth who shall have declared their intention to become citizens, conformably to the laws of the United States on the subject of naturalization, at least thirty days prior to an election."

Section 3, of chapter 26, of the Compiled Statutes provides that "Every male person of the age of twenty-one years or upwards, belonging to either of the following classes, who have resided in the state six months, in the county forty days, and in the precinct, township, or ward, ten days, shall be an elector: First, citizens of the United States. Second, persons of foreign birth who shall have declared their intention to become citizens conformably to the laws of the United States on the subject of naturalization, at least thirty days prior to an election."

It is not contended, nor can it be, that the Indians, or any of them who voted for the respondent, belong to the second class. The sole question, then, presented by this branch of the case is, Do they belong to the first class; are they citizens of the United States?

An act of congress entitled "An act for the removal of the Winnebago Indians and for the sale of their reservation in Minnesota for their benefit," approved February 21, 1863, after making various provisions, not deemed necessary to set out here, proceeds as follows: "And it shall be the duty of the secretary of the interior to allot to said Indians in severalty, lands which they may respectively cultivate and improve, not exceeding eighty acres to each head of a family other than to the chiefs, to whom

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larger allotments may be made, which lands, when so allotted, shall be vested in said Indian and his heirs, without the right of alienation."

On the 8th day of February, 1887, there was approved an act of congress entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the territories over the Indians, and for other purposes." Section 6 provides "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made, shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian, within its jurisdiction, the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made, under the provisions of this act, or under any law or treaty * * * is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizen. * *"

Without entering the indubitable field of discussion against this attempt of the federal legislature to establish a *special* rule of naturalization applicable alone to certain individual members of certain Indian tribes, let us see whether the Indians who voted at the said election are shown to be within the provisions of said act.

It appears from the record that "it was stipulated and agreed by and between the parties at the taking of the testimony, that in Winnebago precinct, of the two hundred and fifty votes cast at the election on November 6, 1888, the plaintiff received fifty-seven votes for the office of county attorney of Dakota county, Nebraska, and the defendant received one hundred and ninety-three votes for

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the said office, and that the following is a list of the names of the persons voting at said election for said office." Here follows a list of about one hundred and ninety-two names.

Jesse F. Warner, Indian agent at the Winnebago and Omaha agency, was sworn and examined as a witness first on behalf of the plaintiff. After the preliminary questions he was asked by plaintiff's counsel as follows:

Q. I will get you to examine this book and state what it is.

A. Yes, sir; it is what is known as the allotment book; of the allotment of the Winnebagos of land in severalty.

Q. To the Winnebago Indians?

A. Yes, sir.

* * * * *

Q. Does that book contain the entry of the allotments of land to the Winnebago tribe or nation of Indians in severalty in Nebraska on there?

A. No, not the allotment in severalty, not the whole of it, not under the law as it now is.

Q. No, I mean under the previous law up to the law known as the Dawes bill.

A. Yes, sir; up to the former law I presume it contained the names; it was sixteen years ago. It was the allotment then, and that allotment was, to a certain extent, continuous from that time on. I delivered some patents since I have been here, to the Indians, that are recorded in that book. There should be none that are not in this book.

Q. Now you may state if you have any record in your office of any allotments made under what is known as the Dawes bill.

A. Not yet.

Q. Has there been any such allotments made?

A. Why the land is selected, and the certificates giving patents have not yet issued. The allotments are not yet complete.

Q. That is under the Dawes bill of February, 1887?

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A. Yes, sir.

Q. Have these allotments been confirmed, and certificates issued by the department?

A. There are none issued yet, as far as I know.

Q. As far as you know the allotments are not complete?

A. Yes, sir. As far as I know we have no office record of any patents having come here yet.

Q. Now, was that the situation of affairs that you have just testified to, at the time of the holding of the election on the 6th day of November, the last general election, the county election, was that the situation of affairs?

A. The land was not all selected at all under the Dawes bill under the new allotment, under the bill or act of congress of February. 1887.

* * * * *

Hereupon the counsel for the plaintiff offers in evidence all of the above identified book, beginning with the first entry on page 35 thereof to the note of page 94, as identified by the reporter, showing what patents were issued and that all of the patents were issued and dated October 22, 1872. There being no objection the same was received in evidence and marked Exhibit "A."

* * * * *

Q. You may state whether or not there has been any collection of all the patents that has been issued prior to the passage of the Dawes bill, under the laws prior to that bill, whether any collection of these patents has been made?

A. Since that time?

Q. Yes, sir; since the patents were issued.

A. Under these second allotments, all of these patents that could be got hold of were collected.

Q. By whom?

A. A special agent appointed for the purpose.

Q. What was her name?

A. Alice C. Fletcher.

Q. When was that done—since you have been agent?

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A. Yes, sir ; she was here part of two years.

Q. She collected these patents and identified the patentees as far as she could?

A. Yes, sir.

Q. How many did she collect, if you know?

A. That I cannot answer ; I don't know.

* * * * *

Q. Where are all the patents that have been issued?

A. They have been delivered to the patentees. Do you mean the old patents?

Q. Yes, sir.

A. No, there was quite a number that I found in the office when I came here, that were made out to persons of white names, as we term it, not Indian names, and they could not tell what Indian was meant by the name. The person making the allotments called them in and gave them papers and said to them, now your name is so and so, and the Indian could not remember the name, and the Indian name was not mentioned in the patent.

Q. There was a number that could not be identified because they were in names that way?

A. Yes, sir.

Q. Do you know how many Miss Fletcher identified as having received patents?

A. I don't.

Q. You say there are still quite a number that were not delivered in your office?

A. No, there is not now.

Q. What became of them?

A. Under instructions from the Indian department they were returned to the government.

Q. Do you know how many you returned?

A. I don't. I returned them through Miss Fletcher ; she managed that ; I would suppose, at a rough guess, that there was not less than twenty-five.

Q. Whatever there were she took charge of?

A. Yes, sir, and returned them as not identified. She made it her special business. They were treated by the government as void.

Upon cross-examination the witness testified that he had been Indian agent there for about three years; that he had resided at the agency, with his family, since within a month of the time of his appointment as such agent. I further quote his testimony:

Q. Now in regard to these patents. You have testified that you are familiar with that book. I will ask you if you know whether or not there were patents issued at the time you speak of in 1872, to all the Omaha Indians, over twenty-one years, at that time residing here, or dwelling here, and all the Winnebago tribe of Indians?

A. It has always been recognized that there was; they were all entitled to their allotments, and it was understood they all secured their allotments—the heads of families.

Q. That were over twenty-one years?

A. Yes, sir.

Q. I will ask you, if you know whether or not at this late election, all parties voting there all belonged to the Winnebago tribes who were parties to whom allotments were made, or rather children of them?

This question, being objected to as being incompetent, no foundation laid, nor the best evidence, and not being proper cross-examination, was not answered.

The witness was then made witness for the respondent, and examined in chief by defendant's counsel, and the last above question being again put to him, he answered over a like objection on the part of the plaintiff:

A. I know of no one voting but who was an original patentee, or the child of an original patentee.

Q. That had become of age since the issuance of these patents?

A. Yes, sir.

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Q. And you were familiar with these Indians from that time you became agent, and since?

A. Yes, sir. I have been quite familiar with them.

This witness was again recalled by the plaintiff, and, *inter alia*, testified as follows:

Q. Did you know how many of these original patentees to land held their patents at the time of the election, and how many had surrendered their original patents under the old act for the purpose of taking new allotments?

A. I do not.

Q. You have no means of knowing that?

A. I have no means of knowing that. That was entirely in the hands of Miss Fletcher; they brought in their patents to find out whether they would take the land under the new allotment, or whether they would retain it under the old patents.

Q. How many were brought in that were afterwards returned?

A. I cannot tell; there were somewhere over—I don't know exactly, but somewhere over fifty, from fifty to sixty, of these old allotments that were not surrendered at all.

Q. The balance were returned for the purpose of taking out new allotments?

A. Taking allotments under the new law.

A stipulation signed by counsel for the plaintiff and respondent is filed with the record "that at the election held in Dakota county on the 6th day of November, 1888, there was cast in said county for the office of county attorney a total of 1,591 votes, of which number plaintiff received 771 votes, and defendant received 820 votes. That in Winnebago precinct, in said county, there was cast a total of 250 votes the same being a part of the above total number of 1,591, and of these votes cast at Winnebago, plaintiff received 57 votes and defendant 193 votes, said Winnebago precinct being a part of the Omaha and Winnebago Indian reservations; that the canvassing board of

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said county duly canvassed the votes for said office and made return ; that of the entire vote of said county, including said Winnebago precinct, defendant, as shown by said return, received a majority of 49 votes, and a certificate of election to said office was duly issued to said defendant, and on the first day of January, 1889, said defendant entered upon the duties of said office, and since said date, and still fills said office of county attorney of said county and has been and is performing the duties of the same."

From the evidence, it appears that all of those voting at said election, at Winnebago precinct, with the exception of six government employes, were Winnebago and Omaha Indians, making 244 votes cast by Indians. There is some attempt made by plaintiff in the examination of witnesses to distinguish between the Winnebago and Omaha Indians, but nothing intelligible was accomplished in that behalf. Deducting the 57 votes cast for the plaintiff in the said precinct from the 244 votes cast by the Indians leaves 187 votes cast by Indians for the respondent. If we deduct this number from the 820 total votes cast for him in the county as returned by the board of canvassers, it would reduce his vote to 633, being 138 votes less than the 771 cast for the plaintiff as returned by the board of canvassers.

There was no attempt made on the part of the respondent to identify the names on the poll list of Winnebago precinct with the names contained in the book of allotments. This was indispensably necessary, in order to establish the legality of the votes. I use the word establish advisedly ; because in any view of the case the members of these tribes of Indians are *prima facie* non-voters. Even under the act of congress of 1887, to constitute an Indian, except one "who has voluntarily taken up his residence
* * * separate and apart from any tribe of Indians
* * * and has adopted the habits of civilized life," a citizen, and so, a voter, that identical Indian must be one

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to whom an allotment has been made. I will not stop to inquire whether the facts necessary to establish the identity of the voter with the allottee can be proved by parol, for, as above stated, no attempt was made to prove them by any species of evidence. It would seem that the original allotment to these Indians had been canceled and withdrawn for the purpose of making a new allotment to them under the provisions of the act of 1887, and that such new allotment has not been completed.

There was a large amount of evidence taken and reported by the referee, chiefly directed to the inquiry as to whether these Indians had or had not abolished their tribal relations with each other and adopted the habits of civilized life. This testimony is utterly irrelevant except upon the theory that it was claimed by the respondent that these Indians were citizens, and hence voters under the second clause of the sixth section of the act of February 8, 1887, popularly known as the Dawes bill, and if so, it were only necessary to show that said Indians continue to live together on an Indian reservation and that the individual Indian has not "taken up * * * his residence separate and apart from any tribe of Indians." As to other Indians it is the allotment to them of lands in severalty by the general government which alone is claimed to make them citizens, and no amount of education, civilization, or cultivation, without such allotment, can do so.

I come to the conclusion, therefore, that none of the Indians who voted at the said election in Winnebago precinct are shown to have been citizens of the United States, or entitled to vote, under the laws of this state. It follows, therefore, that plaintiff was duly elected county attorney for Dakota county at the general election of 1888, for the term of two years from and after the first Thursday after the first Tuesday in January, 1889, and that defendant has unlawfully usurped the said office and now is in the en-

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joyment thereof, etc. A writ of ouster will be issued against him as prayed.

WRIT ALLOWED.

THE other judges concur.

THOMAS M. FRANSE V. SIGMUND ARMBUSTER.

[FILED JANUARY 7, 1890.]

Foreclosure: STAY: APPEARANCE. In an action to foreclose a mortgage on real estate, the mortgagor having removed from the state before the bringing of the action, service of summons was had upon a brother of the mortgagor who resided near the land mortgaged, but on whom legal service in that action could not be made. A decree of foreclosure and sale was thereupon rendered, when the aforesaid brother, in the name of the mortgagor, put in a stay of the order of sale for nine months, of which the mortgagor was duly notified. After the expiration of the stay an order of sale was issued and the land duly sold, the mortgagor being present in the county seat at the time, but making no objection thereto, nor to the order confirming the sale and ordering a deed. *Held*, That the mortgagor, by availing himself of the stay taken in his name by his brother, thereby appeared in the action and was concluded by the decree of foreclosure and sale thereunder.

ERROR to the district court for Cuming county. Tried below before WAKELEY, J.

T. M. Franse, pro se, cited: *Atkins v. Atkins*, 9 Neb., 191; *Frazer v. Miles*, 10 Id., 113; *Murphy v. Lyons*, 19 Id., 689.

J. F. Losch, and *M. McLaughlin, contra*, cited: *Miller v. Hyers*, 11 Neb., 474; *McCreary v. Bratt*, 9 Id., 122; *Sullivan Sav. Inst. v. Clark*, 12 Id., 578; *Sandwich Mfg. Co. v. Shiley*, 15 Id., 110; *Gillespie v. Sawyer*, Id., 536;

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State v. Graham, 21 Id., 355; *Fulton v. Levy*, Id., 478; *Anderson v. Armstead*, 69 Ill., 452; *Foster v. Bettsworth*, 37 Ia., 415; *Eikenberry v. Edwards*, 67 Ia., 14 [24 N. W. Rep., 570]; *Pitcher v. Dove*, 99 Ind., 175; *Vaughn v. Sheridan*, 50 Mich., 155; *Gardner v. Warren*, 52 Id., 309; *Horn v. Cole*, 51 N. H., 287; *Stevens v. Dennott*, Id., 324; *Storrs v. Barker*, 6 Johns. Ch. [N. Y.], 166; *Voorhees v. Olmstead*, 3 Hun [N. Y.], 744; *Phyfe v. Riley*, 15 Wend. [N. Y.], 248; *Continental Bank v. National Bank*, 50 N. Y., 575; *Blair v. Wait*, 69 N. Y., 113; *Kuhl v. Mayor*, 23 N. J. Eq., 84; *Hill v. Payson*, 3 Mass., 560; *Parsons v. Wells*, 17 Mass., 419; *Clark v. Coolidge*, 8 Kan., 189; *Waterson v. Rogers*, 21 Id., 529; *Rudd v. Matthews*, 79 Ky., 479; *Rice v. Bunce*, 49 Mo., 231; *Gillett v. Eaton*, 6 Wis., 30; *Tallman v. Ely*, Id., 244; *Stark v. Brown*, 12 Id., 572; *Racine Co. Bank v. Lathrop*, Id., 466; *Chynoweth v. Tenney*, 10 Id., 397 *; *Hennessey v. Farrell*, 20 Id., 46; *Morgan v. R. Co.*, 96 U. S., 716; *Dickerson v. Colgrove*, 100 Id., 578; *Quick v. Milligan*, 9 N. E. Rep., 393; *Beidman v. Goodell*, 9 N. W. Rep. [Ia.], 900; *Clark v. Ralls*, 24 Id., 567; *Nichols v. Schaffer*, 30 N. W. Rep. [Mich.], 383; 2 Pomeroy, Eq. Jur., sec. 802; *Herman*, Estoppel, 1053.

MAXWELL, J.

This is an action of ejectment brought by the plaintiff against the defendant in the district court of Cuming county to recover the possession of certain real estate. On the trial of the cause the court found the issues in favor of the defendant and dismissed the action.

The testimony tends to show that in March, 1878, one Robert B. Millar, the then owner of the land in controversy, gave a mortgage on said land to Aultman & Taylor Company, to secure the sum of \$713.35; that default was made in the payment of the amount secured by said mort-

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gage, and in April, 1879, a decree of foreclosure and sale was had.

At the time the action to foreclose the mortgage was brought Robert B. Millar was residing in the territory of Dakota, and service of the summons in that action was made on his brother William Millar as agent.

It is not claimed that William Millar was appointed the agent of his brother under the provisions of the statute or that service upon him possessed any validity, and had there been no further appearance in the case the decree would have been void. After the rendition of the decree, however, William Millar, as agent for his brother, in his name obtained a stay, as follows:

"AULTMAN & TAYLOR COMPANY }
v.
ROBERT B. MILLAR ET AL. }

"To the clerk of said court: You are hereby notified that I wish to have a stay of the order of sale on the judgment in the above entitled cause, entered for the time provided by law.

"Witness my hand, May 7, 1879.

"ROBERT B. MILLAR,

"By WM. MILLAR,

"His Ag't."

Soon after this stay was taken Robert B. Millar was informed by the brother of the decree of foreclosure against his land, and that he had requested a stay of order of sale. Robert made no objection to this, but availed himself of the stay. After its expiration and an order of sale had been issued and the land advertised for sale he returned to this state and on the day of the sale was present in West Point, the county seat of Cuming county, but made no objection to said sale. The sale was confirmed without objection and a deed made to the purchasers.

The taking of the stay was an appearance in the action. (*Helmer v. Rehm*, 14 Neb., 219; *Warren v. Dick*, 17 Id.,

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241; *Fee v. Big Sand Iron Co.*, 13 O. S., 563.) And the fact that Robert B. Millar availed himself of the stay taken in his name by his brother was thereby a ratification of his acts. His right of action was therefore barred, and as the plaintiff acquired by the conveyance only the rights of Robert B. Millar, he took nothing by his deed.

The judgment is clearly right and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JOHN COMSTOCK V. GEORGE COLE.

[FILED JANUARY 7, 1890.]

1. **SUMMONS: SERVICE ON ATTORNEY.** Where there are two attorneys of record who appear for one of the parties on the trial of a cause, the service of a summons in error on one of such attorneys, or his waiver of service, will be sufficient.
2. **TITLE: CANNOT BE TRIED BY FORCIBLE ENTRY.** Where there is a controversy as to the ownership of real estate, and a tenant is in possession under one claiming to be the owner, a third party, who has had no prior possession of the premises, but who claims adversely to the landlord of the tenant, cannot maintain an action of forcible entry and detainer against such tenant until he has established his right in a court of competent jurisdiction.

ERROR to the district court for Cedar county. Tried below before CRAWFORD, J.

Barnes Bros., for plaintiff in error;

Evidences of title, such as patents, deeds, etc., were improperly received since no question of title can be litigated in this form of action. (*Myers v. Koenig*, 5 Neb., 422; *Leach v. Sulphen*, 11 Id., 528; *Pettit v. Black*, 13 Id., 154;

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Streeter v. Rolph, Id., 388; *Webster v. Stewart*, 6 Ia., 401; *Beezly v. Burgett*, 15 Id., 192; *Brocken v. Preston*, 1 Pinney [Wis.], 365; *Gates v. Winslow*, 1 Wis., 650; *Ferrell v. Lamar*, Id., 19; *Evill v. Conwell*, 18 Am. Dec., 147.) The gravamen of the action is simply the unlawful, forcible entry. (*Herriter v. Porter*, 23 Cal., 385; *Casey v. King*, 98 Mass., 503; *People v. Carter*, 29 Barb. [N. Y.], 208; *Lane v. Kennedy*, 13 Ohio St., 43.)

B. B. Boyd (*W. F. Bryant*, with him), *contra*:

The certificate of the clerk of the district court shows that there is but one attorney of record for defendant. As no summons was served upon him, proceedings in error were not commenced, and the time for the same is now past. (Code, secs. 584, 585, 592; *Bemis v. Rogers*, 8 Neb., 149-151; *Rogers v. Redick*, 10 Id., 332.)

MAXWELL, J.

This is an action of forcible entry and detainer brought in the county court of Cedar county, where, on the trial of the cause, judgment was rendered for the defendant. The case was then taken on error to the district court, and on the hearing the judgment of the county court was affirmed. After the filing of the transcript in this court the defendant died, and the cause was revived in the name of his administrator. The attorney for the administrator now moves to dismiss the cause, principally because the summons in error was not served upon him. A large number of affidavits in support of and against the motion were filed, and are now before us.

From these affidavits it seems that two attorneys appeared in the case for the defendant Cole, and that such notice was served upon one of them, but not on Mr. Boyd. This service we consider sufficient, and the motion to dismiss is overruled.

The complaint is as follows:

"John Comstock, plaintiff, complains of George Cole, defendant, for that the plaintiff is seized in fee-simple of sections 18 and 19, in town 30 north, range 2 east, in the county of Cedar and state of Nebraska, and is entitled to the possession thereof; that on or about the 1st day of May, 1884, the said George Cole unlawfully and forcibly and with a strong hand entered upon said premises, and does still forcibly and unlawfully detain the possession of said premises from said plaintiff. On the 5th day of May, 1884, the plaintiff served a notice in writing on said George Cole to leave said premises. Plaintiff asks restitution of said premises and costs of suit.

"Dated this 8th day of May, 1884."

To this complaint the defendant by his attorney answered as follows:

"The above named defendant, by B. B. Boyd, his attorney, denies each and every statement and allegation contained in the complaint of the plaintiff herein, and states that he is not guilty as he is therein charged. This defendant states that he is in the possession of the land described in said complaint as a tenant of the owner thereof, and that this defendant entered in such possession as such tenant in good faith."

The testimony tends to show that Cole entered into possession of the land in question as the tenant of one Wakely, a resident of Chicago; that Cole had erected a house on the premises, and broken up a number of acres of land as such tenant. The plaintiff in error does not claim to have been in possession of the premises in question at that time, nor were his grantors.

The land in question constituted the townsite of what is known as the town of Curlew. So far as we can judge by the record before us the town never had any existence except on paper. The land, however, was purchased and laid off into blocks and lots, there being about 11,000 of

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the latter. Of these Cole testifies that the plaintiff claimed to represent about 7,000. This is denied by the plaintiff, who lays claim to the entire tract. The consideration named in the deed, however, as well as the form of the deed itself, shows that he bought at a venture.

It is evident that the rights of the respective parties cannot be determined in an action of forcible entry and detainer, which applies alone to the right of possession, but must be adjudicated in a court having common law powers. We are not prepared to say that Cole was lawfully in possession, but until the plaintiff obtains possession in a lawful manner he cannot maintain an action of forcible entry. The rule would seem to be the same as in an action of trespass. In that case if the land is unoccupied and unimproved, the holder of the legal title may maintain the action. If, however, he does not possess the legal title, he must show an actual possession in himself to maintain the action. (*Yorgensen v. Yorgensen*, 6 Neb., 383.) This rule was applied in *Galligher v. Connell*, 23 Neb., 391, and it was held in effect that the act of entering upon land by one who had previously been out of possession, and performing a small amount of labor, did not constitute such possession as would entitle him to maintain forcible entry and detainer against one whose possession was prior to his. That case in our view states the law correctly, and it is decisive of this case.

The judgment of the district court is right and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

CHRIST HELMER V. COMMERCIAL BANK OF B. M.
WEBSTER.

[FILED JANUARY 7, 1890.]

1. **NEGOTIABLE INSTRUMENTS: INDORSEMENT: WRITTEN GUARANTY CONSTITUTING.** A negotiable promissory note was transferred by the payee, by writing on the back of the note as follows: "For value received I hereby guarantee payment of the within note, and waive demand and notice of protest on the same when due. A. H. Warren." *Held*, To be an indorsement. (*Heard v. Dubuque, etc., Bank*, 8 Neb., 10; *State, etc., Bank v. Haylen*, 14 Id., 480.)
2. ———: **BONA FIDE HOLDER: TRANSFEREE OF COLLATERAL IS.** Where a negotiable promissory note is transferred before due, as collateral security for a loan then made, and is received by the indorsee without notice of any defense existing against it in the hands of the indorser, he is entitled to be treated as a *bona fide* holder and protected, at least to the extent of the loan.

ERROR to the district court for Gage county. Tried below before BROADY, J.

Winter & Kauffman, for plaintiff in error:

The guaranty was not an indorsement in the sense of cutting off the maker's defenses. (*Lamorieux v. Hewitt*, 5 Wend. [N. Y.], 307; *Miller v. Garton*, 2 Hill [N. Y.], 188; *Snevily v. Ekel*, 1 W. & S. [Pa.], 203; *Cannon v. Norton*, 14 Vt., 178; *Andrews v. McCoy*, 41 Am. Dec., 72; *Omaha Nat. Bank v. Walker*, 5 Fed. Rep., 399; *Trust Co. v. Nat. Bank*, 101 U. S., 68.) One who takes paper as collateral security is not a *bona fide* holder for value. (1 Daniel, Neg. Inst., 729, 741; *Bank of Hall*, 6 Ala., 639; *Andrews v. McCoy*, 8 Id., 920; *Ruddick v. Lloyd*, 15 Ia., 441; *Roxborough v. Meesick*, 6 Ohio St., 448.) *Bank v. Haylen*, 14 Neb., 480, and *Heard v. Bank*, 8 Id., 10, differ from the case at bar in that the notes were there purchased outright by the holders.

28	474
28	501
28	474
43	683
28	474
44	899
28	474
50	245

Helmer v. Bank.

A. D. McCandless, contra:

The writing on the back of the note amounted to an indorsement with enlarged liability, and operated as a transfer. (*Heard v. Bank*, 8 Neb., 10; *Bank v. Haylen*, 14 Id., 480; *Robinson v. Lair*, 81 Ia, 9; *Childs v. Davidson*, 38 Ill., 437; *Fawcett v. Ins. Co.*, 5 Ill. App., 272; *Leedy v. Nash*, 67 Ind., 311; *Upham v. Prince*, 12 Mass., 15; *Thomas v. Dodge*, 8 Mich., 51; *Russell v. Klink*, 53 Id., 161; *Phelps v. Church*, 32 N. W. Rep. [Mich.], 30; *Dunning v. Heller*, 103 Pa. St., 269.) Plaintiff, holding the notes as collateral security, stood in the same position as a purchaser for value before maturity. (See cases cited in opinion.)

MAXWELL, J.

This action was brought on a promissory note of which the following is a copy:

"\$210. MARYSVILLE, KANSAS, May 13, 1887.

"Eight months after date I, we, or either of us, promise to pay to the order of A. H. Warren \$210, at the First Nat'l Bank, of Marysville, Kansas, with interest at twelve per cent per annum from date until paid, for value received.

"CHRIST HELMER.

"No. 19362. Due ———, 188—. P. O., Wymore, Neb. (Bank of Wymore Coll., No. 2796, Wymore, Neb.)"

(Indorsed:) "G. B. Jennings. 4389. For value received I hereby guarantee payment of the within note and waive demand and notice of protest on same when due. A. G. Warren. 10 Pd. to Warren, 7/9/87. Pay M. H. Southwick, cashier, or order, for collection and Rets. account of Commercial Bank of B. M. Webster, Essex, Iowa. B. M. Webster, per E. P."

To this note the defendant below (plaintiff in error) interposed first a general denial and second alleged in his an-

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swer that the said note was given to A. H. Warren upon an executory contract and agreement for medical treatment to be rendered and a cure to be effected in the case of defendant's daughter, Paulina Helmer, and upon the full and absolute express guarantee of said A. H. Warren that this said treatment would effect her full and perfect recovery, and in case he failed to restore her to full and perfect health this defendant was to be wholly released and discharged from the payment of said note and from all liability thereon or for said services; that said A. H. Warren did wholly fail to bring about the recovery of his said patient, Paulina Helmer, or to render her any assistance or benefit whatever, whereby the said contract, agreement and express guarantee, which constituted the sole and only consideration for said note, entirely failed, and this defendant has received no benefit or consideration whatever therefor; that said A. H. Warren is a traveling doctor, who came to defendant's house without request directly or indirectly from this defendant or any one for him, on or about the 10th day of April, 1887, and falsely and fraudulently represented to this defendant that he was a regular physician and an expert especially skilled in the treatment of the chronic complaint with which defendant's daughter was suffering, and was a specialist and expert therein and had full knowledge and experience of and in the cause, treatment and cure of the same; that he would effect a complete cure in three months, if defendant would pay him \$100 and would charge him nothing whatever if he failed so to cure her.

"To this proposition this defendant agreed and said A. H. Warren began his pretended treatment, but in the second month thereof informed this defendant that a surgical operation was necessary which could be performed only by a certain physician of St. Joseph, Mo., whose name is unknown to this defendant, and that he must increase the fee by \$110 and then her recovery would be assured.

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Whereupon this defendant agreed to pay \$210 upon express guarantee of her complete cure.

"That later said A. H. Warren falsely and fraudulently represented to this defendant that he had been obliged to send for the physician from St. Joseph, Mo., a second time, and that the latter being unable to come had sent a substitute and that this defendant must again increase the fee by \$100 and was now indebted to him the said A. H. Warren in the sum of \$310 fees and \$35 additional for expenses, but assured the defendant that said operation had been successful, and that his daughter was now completely cured and would under his continued treatments be fully restored to health.

"Upon these false and fraudulent representations of cure and of future attendance this defendant was induced to give said A. H. Warren a horse at the agreed price of \$135 and this said promissory note for \$210, after which said A. H. Warren abandoned said patient and left the country.

"And defendant says that his pretended treatment of said patient effected no cure and gave the patient no benefit or relief whatever; that said pretended visit from and surgical operation by the physician from St. Joseph, Mo., if had at all, was wholly without beneficial results to said patient; that said second visit by substitute of said alleged St. Joseph physician was to this defendant unknown and by him wholly unauthorized or agreed to, and from all these the said patient received no benefit whatever; that said A. H. Warren has already obtained from him by fraudulent means, the sum of \$145, for which the defendant, nor any one for him, has received any benefit whatever, and that especially the said note sued herein was obtained from him by false and fraudulent representations of present cure and further treatment and services to be rendered until said patient was fully restored, and said note has been and is without consideration, save the said executory con-

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tract and express guarantee of cure, which consideration has wholly failed."

On the trial of the cause the plaintiff below (defendant in error) introduced testimony tending to show that the bank took the note in question before due, for a full consideration and without notice of any defense to the same, as collateral security for a prior indebtedness and as security for a new loan.

The plaintiff in error, without introducing any evidence tending to impeach the *bona fides* of the defendant in error in taking the note in question, sought to introduce evidence in support of the allegations of his answer as to the want or fraudulent character of the consideration. This the court excluded until there was some testimony offered tending to impeach the good faith of the bank in taking the paper. In this there was no error.

The indorsement on the note in question is similar to that in *Heard v. Dubuque Co. Bank*, 8 Neb., 10, and *State Nat'l Bank v. Haylen*, 14 Id., 480, and for the reason stated in those cases will be held sufficient.

The next question presented is whether a *bona fide* holder of the note, taken as collateral security for a loan made at the time of indorsement, is entitled to protection? In other words, whether one to whom a negotiable promissory note has been transferred before due as collateral security for a loan, and who takes it without notice of any defense existing against it in the hands of the person from whom he received it, is entitled to be treated as a *bona fide* holder in the commercial sense? We think he is, at least to the extent of the loan. (*Williams v. Smith*, 2 Hill, 301; *Des Moines Nat'l Bank v. Chisholm*, 33 N. W. R., 234; *Lindsay v. Chase*, 104 Mass., 253; *Meyer v. Evans*, 66 Iowa, 179; *McCarty v. Clark*, 10 Id., 588; *Chaffe v. Whitfield*, 4 Southern Rep. [La.], 563; *Bonaud v. Genesi*, 42 Ga., 639; *Smith v. Isaacs*, 23 La. Ann., 454; *Succession of Dolhonde*, 21 Id., 3; *L. S. Bank v. Gaiennie*, 21 Id., 555; *Logan v. Smith*, 62

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Mo., 455; *Buchanan v. Internat'l Bank*, 78 Ill., 500; *State Savings Association v. Hunt*, 17 Kan., 532; *Olney F. A. Bank v. Beaird*, 3 Ill. App., 239; *Davis v. Carson*, 69 Mo., 609; *Pier v. Bullis*, 48 Wis., 429; *Miller v. Pollock*, 99 Pa. St., 202; *Brown v. Callaway*, 41 Ark., 418; *Bone v. Tharp*, 63 Iowa, 223; *Union Bank v. Barber*, 56 Id., 559.)

The cases are not in entire harmony upon this point, but the above rule we deem the better one and we adopt the same. The proof in this case tends to show that the amount of the loan exceeds the security and hence that the holders are entitled to payment in full.

There is no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

LUTHER R. WRIGHT, APPELLANT, V. JAMES W. DAVIS
ET AL., APPELLEES.

[FILED JANUARY 8, 1890.]

1. **Limitation of Actions: FRAUD.** An action for relief on the ground of fraud may be commenced at any time within four years after a discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery. (*Parker v. Kuhn*, 21 Neb., 413.)
2. —: **FRAUDULENT CONVEYANCES.** Where, soon after a conveyance of real estate to the wife of a debtor, he became and was known to be insolvent, and a creditor knew of the facts of such conveyance and insolvency, and knew of the occupation and improvement of the real estate by the debtor, having knowledge of such facts as would suggest the fraudulent character of the conveyance, and which, if pursued, would lead to a knowledge of the fraud, it was held, that the statute of limita-

28	479
36	786
28	479
49	311
28	479
58	143

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tions began to run under the provisions of section 12 of the Civil Code, and that the creditor's right to subject the property to the payment of his debt on account of the fraud would be barred in four years.

APPEAL from the district court for Douglas county.
Heard below before WAKELEY, J.

L. R. Wright, and *Breen & Duffie*, for appellant, cited, on the question of the statute of limitations: *Clew v. Traer*, 57 Ia., 459; 115 U. S., 528; *Laird v. Kilbourne*, 70 Id., 83; *Parker v. Kuhn*, 21 Neb., 413; *O'Dell v. Burnham*, 21 Wis., 562; *Martin v. Smith*, 1 Dill. [U. S.], 85.

Charles B. Keller, for appellees:

The only fact that appellant claims to have learned, which would take this case out of the statute, was as to the nature of the transfer to and by Mrs. Davis. This does not prove discovery of, or facts constituting, fraud sufficient to stop the running of the statute, as the same could have been learned before by examining the record. (*Parker v. Kuhn*, 21 Neb., 427; *Hellman v. Davis*, 24 Id., 793.) The action must be brought within the prescribed time after the actual doing of the thing complained of. (Moak's Underhill on Torts, 65.) When the tort is continuing, the right is also. (Id., 69.)

REESE, CH. J.

This action was instituted in the district court of Douglas county and was in the nature of a creditor's bill. It was alleged in the petition that in the year 1868 James W. Davis became indebted to the plaintiff, and that upon such indebtedness plaintiff recovered a judgment against the said Davis for the sum of \$3,069.70, said judgment having been rendered by the district court of Douglas county; that the judgment became dormant and that the same was revived

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by the order of said court at the October term thereof, 1885, and it thereby became a lien upon all the real estate of the said defendant, situate in said Douglas county; that on the 19th day of June, 1886, plaintiff caused an execution to be issued upon said judgment and placed in the hands of the sheriff; and that on the 23d day of August, of the same year, the sheriff returned said execution unsatisfied, for want of property upon which to levy and make the same; that the said Davis, about the date of the incurring of the indebtedness and before and at the time of the recovery of said judgment, was indebted to numerous persons and contemplated utter insolvency, and with a view to defraud, hinder, and delay his creditors, at the time and date mentioned in the petition, purchased certain real estate, which is described therein, with his own means and money, and for the purpose of hindering, delaying, and defrauding his creditors, caused the title to said property to be taken in the name of defendant Elizabeth Davis, his wife; that at the time of the execution of the conveyances to her she well knew of the insolvent condition and fraudulent intentions of the said James W. Davis, her husband, and combined and confederated with him to hinder, delay, and defraud his creditors, and that all of the property described in the petition was in truth and in fact the property of the said James W. Davis, and subject to the payment of his debts; that subsequent to the execution of the deed of conveyance to her, and in the years 1879 and 1880, she conveyed the real estate to certain persons named in the petition and who after that time reconveyed the same to her; but that the persons to whom she conveyed the property never owned the same and had no title therein, the conveyance being made for the purpose of covering up and hiding the title, and thus assisting in defrauding the creditors of the said James W. Davis; that during all of said time the said James W. Davis was the sole owner of the real estate, and that he erected buildings and made improvements thereon of great

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value and paid for the same out of his own means. The other defendants were referred to in the petition as claiming to have some interest in fractional portions of the real estate described, but it was alleged that whatever interest they had was obtained subsequent to the rendition of the judgment and with full notice of the lien created thereby, and that the said James W. Davis was the sole owner of the property. The prayer of the petition was that a decree might be entered declaring the property to have been the property of James W. Davis and be made subject to plaintiff's judgment.

The defendants, James W. and Elizabeth Davis, filed separate answers, denying all the allegations of the petition, excepting that they were husband and wife; that the deeds were executed to Elizabeth Davis and recorded at the time alleged in the petition; that the improvements made upon the real estate were made by James W. Davis in the year 1868, and also pleading the statute of limitations.

To these answers plaintiff filed a reply, realleging the fraudulent character of the deed to Elizabeth Davis; denying that the record of the deed imparted notice to him; denying knowledge that the real estate was the property of the said James W. Davis, and alleging that aside from what was shown by the records of Douglas county the fraud was discovered and made known to the plaintiff within one year previous to the commencement of the action, and not before, and that the cause of action accrued upon the discovery of the fraud.

The other defendants filed separate answers alleging their purchase of the portions of the real estate occupied by them; that the same was made in good faith and for value, and without any knowledge of plaintiff's alleged rights under his judgment.

The cause was tried to the district court, the trial resulting in a general finding in favor of all the defendants, and a decree dismissing plaintiff's petition. From this decree plaintiff appeals.

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A number of questions are presented for consideration by the briefs, but it is deemed essential to notice but one, as it is thought to be decisive of the case.

There is no question but that the plaintiff's right to apply the property to the payment of his claim was barred by the statute of limitations if the statute began to run upon the filing for record of the deed by which the real estate was finally conveyed to Mrs. Davis, for by sec. 12 of the Civil Code the statutory limit is four years after the discovery of the fraud. This section of the Code has been construed by this court, so far as its application to the question involved in this case is concerned, in *Hellman v. Davis*, 24 Neb., 793; *Parker v. Kuhn*, 21 Id., 413; *Blake v. Chambers*, 4 Id., 90. By these cases it is pretty well settled in this state that while the person against whom a fraud has been perpetrated has four years from the discovery of the fraud in which to commence his suit, yet the fraud will be deemed to have been discovered when such facts are known, either actually or constructively, as would amount to knowledge, or which would naturally suggest such inquiries as, if followed up, would lead to such knowledge. This being the rule, we are led to inquire whether plaintiff is entitled to pursue his action to a favorable decree, as having discovered the fraud within four years prior to its commencement, or whether by lapse of time his right to relief has become barred.

The land which it is sought to subject to the payment of plaintiff's judgment is described as the north half of the northwest quarter of section 35, township 15 north, range 12 east, in Douglas county. It clearly appears that the conveyances were made and placed on record at a time when defendant was known to be insolvent, or at least just prior thereto; that defendant resided upon the land and made improvements thereon, and that plaintiff knew in the year 1876, or prior thereto, of such residence; that it was claimed by some of the family and was charged

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by the record with knowledge of the condition of the title as it then appeared. In answer to the question, "You knew this land had been bought and stood in the name of Mrs. Davis?" he answered, "I presume I did. I don't think I ever looked at the records, but I was satisfied that was the case." He had seen defendant very frequently after his judgment was obtained, had conversed with him about it and the payment of the claim, had received assurances that it would be paid, that he was "to be taken care of," and that the parties in New York to whom defendant J. W. Davis was hopelessly indebted, had agreed to "wipe out the indebtedness so that it would not be hanging over Davis" and at that time he would get his money. It appears from all the evidence that plaintiff was fully aware of the financial condition of Davis and that the conveyances to his (Davis') wife could not be otherwise than fraudulent. Or, if this cannot be said to have been fully established, that by the most superficial examination suggested by facts within his knowledge he might have had full and complete knowledge of the condition of the title. As we have seen, this was sufficient to cause the statute to run.

The decree of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1890.

PRESENT:
HON. AMASA COBB, CHIEF JUSTICE.
" SAMUEL MAXWELL, } JUDGES.
" T. L. NORVAL, }

STATE, EX REL. JOHN McLANE, V. WELDON B.
COMPTON.

[FILED JANUARY 14, 1890.]

1. **School Districts: CHANGE OF BOUNDARIES: PETITION REQUIRED.** To give a county superintendent of schools jurisdiction to detach a part of the territory of a school district and attach the same to an adjoining district, a petition in writing, duly signed, must be presented to him for that purpose, and an oral request to perform such acts is not sufficient.
2. ———: **NOTICE REQUIRED.** No change of this kind should be made without due notice being given of the time and place when a hearing will be had in the matter.

ERROR to the district court for Johnson county. Heard below before APPELGET, J.

28	485
39	396
28	485
42	501

State, ex rel. McLane, v. Compton.

S. P. Davidson, for plaintiff in error:

Under sec. 4, subd. 1, chap. 79, Comp. Stats., a written petition was a jurisdictional requirement. (*State, ex rel. Donovan, v. Palmer*, 18 Neb., 644; *Cowles v. School District 23*, Id., 659.) So, also, is notice of time and place of changing boundaries. (*Windsor v. McVeigh*, 93 U. S., 274; 1 Herman, Estoppel, etc., p. 74.) The orders of a county superintendent, who acts outside of his jurisdiction, are subject to collateral attack.

S. D. Porter, for defendant in error:

Under the statute above cited, the action of the superintendent must be reviewed by appeal to the district court; not by original action or collateral attack. (*Brown v. Com'rs*, 6 Neb., 111-19.) He is an officer exercising judicial functions, and his action cannot be controlled by *mandamus*. (*Brown v. Com'rs, supra*; *State, ex rel. Shull, v. Clary*, 25 Neb., 603.) There is nothing to show that plaintiffs in error were authorized, at a district meeting, to bring this suit. Without such authority they have no legal capacity to sue. (*Bowen v. School District*, 10 Neb., 265.

MAXWELL, J.

This is an application for a *mandamus* to compel the defendant, as county superintendent of the public schools of Johnson county, to restore the boundaries of school district 43 of that county. A demurrer to the petition was sustained in the court below, and the action dismissed.

The relator alleges in the petition that "said relators are all legal voters of school district No. 43, in Johnson county, Nebraska, and that they constitute a large majority of the legal voters of said district, and that said district has been duly organized as such district for more than

fifteen years last past; that during the fifteen years last past, up to the commission of the wrongs by defendant mentioned, said district has been composed of sections 17, 18, 19, and 20, in town 4 north, of range 9 east in said county, and of no other lands or territory whatever; and that during all of said time, until the past summer, the school in said district has been situated only eighty rods west of the center thereof, but for several years last past and before the commission of the wrongs below mentioned said district has been trying to procure a site for and arrange to rebuild said school house at the center of said district, and during the summer of 1888 this object was attained, and said school house was removed to and rebuilt at the center of said district, where it now is; that at the time of the commission of the wrongs by defendant herein complained of said district was composed of the smallest extent of territory provided by law for any one district, while district No. 1, below mentioned, was composed of five and one-half sections of land, and included the village of Crab Orchard, a village of more than 200 inhabitants, in which also had been erected many and valuable store buildings and other business houses, and also included many large stocks of merchandise and other valuable personal property, while the said four sections, of which said district 43 was composed, were used exclusively for farming and grazing purposes, and contained only moderate improvements for such purposes. One J. S. Turner owns a large part of the northeast quarter of said section 17, and his house and buildings are situated upon the east half of the northeast quarter of the northeast quarter of said section 17, which is owned by him, and no stream or water-course intervenes between his said house or dwelling place and the said school house, either now or at any time, which renders it impracticable for his children to attend school in said district No. 43.

“That defendant is, and at the time of the commission of the wrongs complained of was, the acting superintendent of

State, ex rel. McLane, v. Compton.

schools in and for said county; that no petition was presented to him to change the boundaries of said district No. 43 or to detach any portion of the territory composing it therefrom and attach it to district No. 1 in said county, and no notice of any kind was ever given or served or posted containing a statement of what changes were proposed in said district boundaries, and of the time and place when and where said petition would be presented to the county superintendent.

"And no notice was ever given, posted, or served upon any one showing when and where any request from said Turner to be set off with any of his land from said district No. 43 and attached to said district No. 1 would be presented to and considered by said county superintendent, and plaintiffs believe and aver that no such petition or request in writing was ever presented to and filed with said defendant; that since the 1st day of April, 1888, and after the assessors' books for said county had been issued to the several assessors for the various precincts for the then ensuing year, and said assessors had begun the work of making their assessments for the year, without authority of law, in violation of the plaintiff's rights in the premises and not in good faith but in collusion with said Turner, this defendant wrongfully changed the boundaries of said district No. 43 upon the map, showing the location and boundaries of school districts in said county, by changing the lines of said district 43 so as to show that the said east half of the northeast quarter of the northeast quarter of said section 17 had been detached from said district No. 43 and attached to said district No. 1, which is adjacent thereto, and informed the county clerk and county treasurer of said county of such attempted change, and that all uncollected tax upon said land and property so detached should be placed to the credit of said district No. 1, which is a school district of said county. By such unauthorized and illegal conduct said defendant has wrongfully attempted to so

detach said property from said district No. 43 and attach the same to said district No. 1, and now asserts and claims that he has done so, and that said land and property so detached from said district No. 43 now belongs to and forms a part of said district No. 1.

"That said Frederick Kohn is treasurer, said John Redmond moderator, and said John Beal director of said district No. 43, and they heartily join with the other plaintiffs in prosecuting this petition for relief from said wrongs."

The question presented is, Did the defendant have jurisdiction to make the change in question? If so, then his action cannot be corrected by *mandamus*. If, however, the jurisdictional facts do not exist in the case, then his action in the premises is void and will be so declared by this court. Sec. 4, ch. 79, Comp. Stats. 1887, provides:

"New districts may be formed from other organized districts, and boundaries of existing districts may be changed under the following conditions only:

"First—It shall be the duty of the county superintendent to create a new district from other organized districts, upon a petition signed by one-half of the legal voters in each district affected.

"Second—The county superintendent shall have discretionary power to change the boundary of any district upon petitions signed by one-third of the legal voters in the district affected.

"Third—The county superintendent shall not refuse to change the boundary line of any district, or to organize a new district when he shall be asked to do so by a petition from each school district affected, signed by two-thirds of all the legal voters in such district. A notice of said petition, containing an exact statement of what changes in district boundaries are proposed and when the petition is to be presented to the county superintendent, shall be posted in three public places, one of which places shall be

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upon the outer door of the school house, if there be one, in each district affected, at least ten days prior to the time of presenting the petition to the county superintendent; *Provided*, That changes affecting cities shall be made upon the petition of the board of education of the district or districts affected.

"Fourth—A list or lists of all the legal voters in each district affected, made under the oath of a resident of each district affected, together with an oath of a resident of each district that the legal notice provided in the third clause of this section has been properly posted, shall be given to the county superintendent when the petition is presented.

"Fifth—No new districts shall be formed between the first Tuesday of April and the first day of August.

"Sixth—No new districts shall be formed containing less than four sections of land, nor shall any district be reduced by division or otherwise so as to contain less than that amount, unless the district be so formed, or the part of a district remaining after division, shall have an assessed valuation of property of not less than \$12,000. No district shall be formed extending more than six miles in any one direction upon section lines; *Provided*, That when streams or water-courses make it impracticable to form districts containing four sections, then the county superintendent may form districts with less than four sections, without regard to valuation.

"When streams of water make it impracticable for children to attend school in their own district, the county superintendent shall have authority, and it shall be his duty when requested by the parents of such children, to attach to adjoining districts such territory as he may deem necessary for the purpose of giving said children school privileges.

"Seventh—The county superintendent shall file in his office all petitions that have been granted for change of boundaries or for the formation of new districts, and such

petitions shall be *prima facie* evidence of the boundaries of districts; and all conflicting records of boundaries shall be made to correspond with the petitions so filed."

If the allegations of the petition are true, then the defendant, without a petition and without notice, changed the boundaries of the district. This he had no authority to do. A petition for changing the boundaries of a school district must be in writing, as it becomes a matter of record and the groundwork for the exercise of jurisdiction by the superintendent. Notice should also be given of any proposed changes and the time and place for hearing the same, so that those interested may have an opportunity to be heard and if necessary protect their rights by an appeal to the courts. Changes in the boundaries of a school district may seriously affect its prosperity, as by reducing the number of its scholars so low as to destroy emulation among them, or so to reduce the amount of taxable property therein as to prevent the school being sustained in a proper manner. Therefore, in order to secure a change in the boundaries of a district a petition duly signed by the requisite number of persons must be presented to the superintendent, and without such petition he has no authority to act.

If it be said that the statute does not in express terms require such petition to be in writing, the answer is, that such requirement is clearly implied, if not expressly provided for. It will be observed that under the provisions of the section quoted the boundaries of existing districts can be changed under the following conditions—*only*: First, by petition; second, by petition; and, third, by petition, of which notice shall be given, etc.

The duties of superintendent are alone those prescribed in the statute. His official acts, so far at least as district boundaries are concerned, determine what lands shall be included in a district, and hence taxable therein, and also who, as a matter of right, may attend school in the district. The case in some of its features resembles that of *State*,

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ex rel. Goff, v. Dodge County, 20 Neb., 595, in which it was held that to justify the board of equalization in increasing the assessment of an individual a complaint in writing must be made. The reasons for this requirement are fully stated in that case and need not be repeated here. We adhere to that decision, however, and it is decisive of this case.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

MARIA RECKEWEY, APPELLEE, V. JOHN WALTERMATH
ET AL., APPELLANTS.

[FILED JANUARY 14, 1890.]

1. **DEMURRER: PLEADING OVER: WAIVES DEFECTS.** Where there is a failure to state a material fact in a petition and a demurrer thereto is overruled and the defendant answers the petition, to which answer a reply is made setting up facts which should have been stated in the petition and which, if alleged therein, would have made it sufficient to resist a demurrer, and the case without objection is tried upon the issues thus made, and judgment rendered for the plaintiff, it will be too late for the defendant to rely upon his demurrer. (*Pottinger v. Garrison*, 3 Neb., 221.) In other words, the pleadings taken together present the necessary facts to entitle the plaintiff to recover.
2. **Finding and judgment sustained by the clear weight of evidence.**

APPEAL from the district court for Johnson county.
Heard below before APPELGET, J.

L. C. Chapman, for appellants.

A. M. Appelget, for appellee.

MAXWELL, J.

This is an action of partition brought by the plaintiff against the defendant in the district court of Johnson county, and on the trial the court found the facts as follows:

"The court finds that the plaintiff, Maria Reckewey, is the widow of Henry Reckewey, deceased, and without issue as set forth in the petition, and as such widow is the owner of seven-eighths ($\frac{7}{8}$) interest in that part of lot four (4) described in plaintiff's petition, to-wit, beginning at the northwest corner of lot 4 in block 42, thence running south 70 feet, thence east 22 feet, thence south 120 feet, thence east 22 feet, thence north 190 feet, thence west 44 feet to place of beginning; and also the owner of seven-eighths ($\frac{7}{8}$) of the undivided one-half ($\frac{1}{2}$) of lots 7 and 8 in said block 42, and that the defendant, John Waltemath is the owner of the undivided one-half of said lots 7 and 8 in block 42, all being in the city of Tecumseh, Johnson county, state of Nebraska. And the court finds that defendants, Minnie Einaca, Bertha Einaca, Sophia Einaca, Louisa Einaca, Caroline Einaca, Emma Einaca, Alvina Einaca, and Willie Einaca, minors, are each the owner of one sixty-fourth ($\frac{1}{64}$) part of said lot four (4), also each the owner of one sixty-fourth ($\frac{1}{64}$) part of the undivided one-half ($\frac{1}{2}$) of said lots 7 and 8 in said block forty-two (42), which rights are subject to the dower right of the widow (the plaintiff) Maria Reckewey."

The first objection is error in overruling a demurrer to the petition on the ground that it fails to state a cause of action because it does not contain an allegation that the debts, allowances, and expenses against the estate have been paid or provided for, or that the plaintiff has given bond to secure the same.

In *Alexander v. Alexander*, 26 Neb., 68, this court held that an heir or devisee of an estate cannot main-

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tain an action of distribution or partition until the debts, allowances, and expenses against the estate have been paid or provided for, unless he give a bond with approved sureties to pay the same. This, we think, is a correct statement of the law, as only the residue of an estate that remains after the debts and expenses against the estate have been paid will pass to the devisees or heirs. Had the defendants therefore relied upon the insufficiency of the petition and the overruling of the demurrer thereto, the judgment would necessarily be reversed. The defendant Waltemath, however, answered the petition, claiming to be a surviving partner of the firm of Reckewey & Waltemath, and that said firm owned the real estate in question as partnership property. There is also an offer in his answer to divide the property with the plaintiff in a certain manner which need not be noticed here. In the reply the plaintiff alleged that she had given a bond, which had been duly approved, for the payment of the debts, allowances, and expenses against the estate.

Upon the issues thus made the case was tried and the testimony shows that there were no debts owing by the firm of Reckewey & Waltemath, nor any obligations against that firm except the taxes on the property for 1889, that the plaintiff has a title in fee to a large portion of the real estate in controversy and a dower interest in the residue, and that the finding and judgment of the court are in accordance with the evidence. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

OWEN JONES ET AL. V. STATE.

[FILED JANUARY 14, 1890.]

1. **Religious Societies: DISTURBANCE: INFORMATION.** An information against certain parties charging that at certain times and places they did "willfully, maliciously and unlawfully interrupt, molest, and disturb a religious society, to-wit, 'The Welsh Presbyterian church,' and the members thereof while said members were met to perform the duties enjoined upon them and appertaining to them as members," etc., is sufficient to sustain a conviction.
2. ———: **EXPULSION OF MEMBERS.** A church organization may make rules by which the admission and expulsion of its members are to be regulated and the members must conform to these rules. If, however, it has no rules on the subject, those of the common law prevail, and before a member can be expelled notice must be given him to answer the charge made against him and an opportunity offered to make his defense, and an order of expulsion without such notice and opportunity is void.

ERROR to the district court for Gage county. Tried below before BROADY, J.

Pemberton & Bush, and *Winter & Kauffman*, for plaintiffs in error, cited: 2 Bishop, Crim. Pro., secs. 285, 289, 290, 293, 294; *Stratton v. State*, 13 Ark., 688; *State v. Ringer*, 6 Blackf. [Ind], 109; *State v. Sherrill*, 1 Jones L. [N. Car.], 508; *Cearfoss v. State*, 42 Md., 403; *Commonwealth v. Richardson*, 126 Mass., 34; *State v. Armell*, 8 Kan., 288; *U. S. v. Mills*, 7 Peters [U. S.], 141; *State v. Seamons*, 1 G. Greene [Ia.], 418; *State v. Bryce*, 7 Ohio, pt. 2, 82; *Lamberton v. State*, 11 Id., 282; *Ellars v. State*, 25 Ohio St., 388; 1 Dillon, Mun. Corp., sec. 253; *Com. v. Oliver*, 2 Parsons, Sel. Cases (Pa.), 426; *Black, etc., Soc. v. Vandyke*, 30 Am. Dec., 265; *Hiss v. Bartlett*, 63 Id., 776.

Wm. Leese, Attorney General, and *Burke & Prout*, contra, cited: Maxwell, Crim. Pro., 286; *State v. Stubblefield*, 32

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Mo., 563; *Kindred v. State*, 33 Tex., 67; *State v. Ratcliff*, 10 Ark., 530; *State, ex rel. Bryant, v. Lauver*, 26 Neb., 757; *Ex parte Maule*, 19 Id., 273; *Cropsey v. Wiggenghorn*, 3 Id., 117; *Wells v. Preston*, Id., 444; *Horbach v. Miller*, 4 Id., 43; *Dodge v. People*, Id., 220; *Walrath v. State*, 8 Id., 89; *Midland P. R. Co. v. McCartney*, 1 Id., 404; *Schroeder v. Rhinehardt*, 25 Id., 75; *M. P. R. Co. v. Hays*, 15 Id., 224; *State v. Swarts*, 9 Id., 221; *Bird v. Church*, 62 Ia., 567; *Sale v. Church*, Id., 26; *Hardin v. Church*, 51 Mich., 137; *Ter Vree v. Geerlings*, 55 Id., 562; 22 N. W. Rep., 91.

MAXWELL, J.

The plaintiffs in error were convicted of "interrupting and molesting a religious meeting as charged, in the complaint," and sentenced to pay a fine of \$10 each and costs.

The first ground of error assigned is that the complaint does not charge an offense. The complaint is as follows:

"The complaint and information of David Edwards, made before Richard Whitten, one of the justices of the peace in and for Gage county, Nebraska, who being first duly sworn, on his oath says that Owen Jones and Owen Parry, late of said county, at and within said county on the 11th day of December, A. D., 1887, and on divers other Sundays before said date, did willfully, maliciously, and unlawfully interrupt, molest, and disturb a religious society, to-wit, 'The Welsh Presbyterian church,' and the members thereof, while said members were met to perform the duties enjoined upon them and appertaining to them as members of said religious society, the said Owen Jones and Owen Parry not then and there being members of said religious society, having no right to be present at said meeting.

"He therefore prays that the said Owen Jones and Owen Parry may be arrested and dealt with according to law.

"DAVID EDWARDS.

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"Subscribed in my presence and sworn to before me this 12th day of December, 1887.

"RICHARD WHITTEN,
"Justice of the Peace."

The general rule is that the manner of the disturbance should be alleged, as by talking, laughing, or profane swearing. (*Cookreham v. State*, 7 Humph., 11; *State v. Stubblefield*, 32 Mo., 563; *Kidder v. State*, 58 Ind., 68; *State v. Ringer*, 6 Blackf., 109; *Lockett v. State*, 40 Tex., 4; Maxwell, Cr. Pro., 286.)

We are not prepared, however, to say that the complaint is void. The charge that the plaintiffs in error at certain dates "did willfully, maliciously, and unlawfully interrupt, molest, and disturb a religious meeting, to-wit, 'The Welsh Presbyterian church,' and the members thereof, while such members were met to perform the duties enjoined upon them," etc., states an offense under the statute. (*State v. Lauver*, 26 Neb., 757.) The language of the statute is "If any person shall at any time interrupt or molest any religious society, or any member thereof, or any persons when meeting or met together for the purpose of worship, or performing any duties enjoined on or appertaining to them as members of such society," and the complaint is nearly in the words of such statute. The objections to the complaint therefore are overruled.

It will be observed that it is charged in the information that "the said Owen Jones and Owen Parry, not then being members of said religious society, and having no right to be present at said meeting, were present," etc. This allegation having been made, it becomes material in the case.

The proof shows—in fact, it is admitted—that the plaintiffs in error had been members of the church in question, but it is claimed they were expelled, and thereby ceased to be members. It is not claimed that any open trial was had, or that the parties accused were notified to

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appear and defend any accusation against them, nor do any facts appear from which the society would have the right to exclude the parties named from its membership.

Any society may make rules by which the admission and expulsion of its members are to be regulated, and the members must conform to those rules. If, however, there are no rules governing the case, then, before a member can be expelled, a charge must be made against him, and notice given to him to make his defense, and opportunity presented to make the same. (*Innes v. Wylie*, 1 Car. & K., 257; S. C. 47, E. C. L., 255.) In the case cited a member of a society had used menacing language towards another member of the society, and for this a majority of a general meeting of the society voted that he should no longer be considered a member thereof, but gave him no notice of the intention to take his conduct into consideration or any opportunity to make his defense. It was held that he was still a member, and the order of expulsion was void. (*Rex v. Richardson*, 1 Burr., 540; *Rex v. Liverpool*, 2 Id., 731; Ang. & A. on Corp., sec. 420.)

The rules of the church, if any, for the admission and expulsion of members were not offered nor introduced in evidence, nor any proof of a public trial upon any charge or any notice to the plaintiffs in error to appear and answer any specific charges. In the absence of any rules the common law prevails.

In *State v. Bryce*, 7 Ohio, pt. 2, 82, it is said: "This proceeding is essentially adversary in its character. The justice of the common law permits no investigation of facts which may be followed by the loss of a right, or by the infliction of penalty, to be conducted *ex parte*. It is essential to its validity that the party should be duly summoned. (4 Black., Com., 282; 1 East, 638; 6 Conn., 542; 2 Serg. & R., 141; 1 Burr., 540; Doug., 174.)"

The case cited was one where it was alleged that the relator had forfeited his office of trustee of the Ohio Uni-

versity by neglecting his duties, but it is applicable to that under consideration.

A church society is a voluntary organization formed for the advancement of the spiritual welfare of its members by counsel, admonition, and example, and to enable the society to employ and pay a pastor to look after, not only the welfare of that particular organization, but many charitable objects requiring aid, and to promote, as far as possible with the means at hand, the welfare of the race. There must be freedom of individual thought, and in respectful language, expression to such thoughts. It may be presumed that no sincere follower of the Master will so far forget his duty as to indulge in railings or unjust accusation. The right of membership is a valuable privilege of which no one should be debarred, except for adequate cause, shown either by the rules of the society or after a fair examination of the charges, after due notice. As neither of those things appear to have taken place, the order of expulsion would seem to be void.

In saying this, however, we do not intend to justify the conduct of the plaintiffs in error as shown by the testimony of some of the witnesses. The respect due to their associates certainly required the use of words of a less belligerent character.

Whether the use of the words and the conduct of the parties generally were sufficient under the rules of the organization, if any such there were, or would be deemed sufficient after a fair trial, for the expulsion of the parties, is a matter for the determination of the church tribunals, and need not be considered here; but for the want of proof showing the right of the society to expel the plaintiffs in error, the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

28	500
28	228
28	500
44	758
44	899

T. T. WEITZ v. C. C. WOLFE.

[FILED JANUARY 14, 1890.]

1. **Negotiable Instruments: INDORSEMENT: WRITTEN GUARANTY IS.** Where the payee of a negotiable promissory note sells the same with the following written on the back of it: "I guarantee the payment of the within note, waiving demand and notice of protest," which is signed by the payee, *Acid*, to constitute an indorsement, and that the maker and indorser may be joined in an action on said note.
2. **Review: ERRORS MUST BE ASSIGNED.** "In an action at law, to obtain a review of errors, which have occurred during the progress of a trial, they must be assigned in a motion for a new trial." (*Manning v. Cunningham*, 21 Neb., 288.)

ERROR to the district court for Johnson county. Tried below before APPELGET, J.

Clarence K. Chamberlain, for plaintiff in error.

S. P. Davidson, *contra*.

NORVAL, J.

This action was brought in the county court of Johnson county to recover the amount due on a promissory note for \$309, made by one R. P. Jennings, and payable to the order of T. T. Weitz. Before maturity, the payee sold and transferred said note to the defendant in error Wolfe, making the following indorsement of the same: "I guarantee the payment of the within note, waiving demand and notice of protest. T. T. Weitz." Jennings and Weitz were made defendants. The former did not appear, although served. The latter answered alleging a misjoinder of parties and of causes of action. A reply was filed, trial had, and judgment rendered against both defendants. Weitz alone appealed to the district court, where the defendant in error filed his petition, which was substantially the same as

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the one filed in the lower court, except that in the prayer judgment was asked against Weitz alone. Plaintiff in error moved to strike the petition from the files, because it stated a different cause of action from that set up in the county court. This motion was overruled, and the defendant answered, alleging the misjoinder of parties and causes of action. A reply was filed, the cause was tried to the court, and judgment was rendered against the plaintiff in error for the amount of the note. A motion for a new trial was overruled, and Weitz brings the case here by petition in error.

It is contended that Weitz was simply a guarantor, and is not liable in the same action with Jennings, the maker of the note, and the case of *Mowery v. Mast*, 9 Neb., 445, is cited to support the position. That was a case where one Calvert executed a note to Mast & Co., which note was before its delivery guaranteed by one Mowery. It was correctly held in that case that a joint action would not lie against the maker and guarantor of a promissory note. The indorsement in that case did not transfer the note.* In the case at bar the payee sold and indorsed the note to Wolfe, using the words: "I guarantee the payment of the within note, waiving demand and notice of protest." The indorsement in this case being signed by the payee, operated as a transfer of the note. At the present term of this court, in the case of *Helmer v. Commercial Bank, etc.*, ante, p. 474, a writing, like the one quoted above, was held to be an indorsement. The liability of Weitz was not lessened because the indorsement contained the word "guarantee." He is an indorser and was properly sued with the maker in the same action. (Compiled Statutes, 1887, p. 471, sec. 6.)

No error was committed in excluding as evidence the petition, answer, and reply on which the cause was tried in the county court. These pleadings were substantially the same as those filed in the district court, and clearly show that the case was tried in both courts on the same issues.

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We will not consider the other alleged errors mentioned in the brief of plaintiff in error, for the reason that they were not complained of in the motion for a new trial. It is only those errors that are assigned in the motion for a new trial that this court will consider. (*Manning v. Cunningham*, 21 Neb., 288).

There being no reversible error in the record, the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

CHARLES ALDRICH ET AL., APPELLEES, V. LAURA G.
LEWIS ET AL., APPELLANTS.

[FILED JANUARY 28, 1890.]

Foreclosure Sale: INTERFERENCE WITH BIDDERS. Where it appears, by affidavits in the proceeding to confirm a sale of land made in a foreclosure proceeding, that there was an unwarrantable interference with a bidder at such sale by a county attorney, which interference was countenanced and communicated to such bidder by the sheriff making such sale, and by reason of such interference such bidder ceased to bid, and the land was sold at a sum materially below its value and below the amount which would have been bid had it not been for such interference, on appeal, *held*, that the sale be set aside.

APPEAL from the district court for Fillmore county.
Heard below before MORRIS, J.

F. B. Donisthorpe, for appellants, cited *Taylor v. Courtney*, 15 Neb., 199; *Paulett v. Peabody*, 3 Id., 196.

W R. Gaylord, for appellee Aldrich.

W. C. Sloan, for appellees, Swartz Bros. and J. B. McLaughlin.

COBB, CH. J.

This proceeding was appealed from the decree confirming the sale of certain real estate in the district court of Fillmore county, in which Arlington M. Walrath and Kitty Walrath, his wife, are appellants.

On February 2, 1889, an order of sale was issued out of said court, returnable on the first day of the next term, commanding the sheriff to appraise, advertise and sell, according to law, the north half of the northwest quarter of section 23, of township 7 north, range 3 west of the 6th P. M., in said county, to satisfy a judgment of said court, rendered June 4, 1888, wherein Charles Aldrich was plaintiff, and Laura G. Lewis, Charles E. Lewis, Arlington M. Walrath, Kitty Walrath, E. Bennett & Son, and Charles A. Harvey & Co. were defendants, for the sum of \$1,-184.45 and \$51.48 costs.

The sheriff proceeded to execute said order, having the property appraised and advertised, and on March 9, 1889, at the court house in Geneva, sold the same to J. B. McLaughlin for \$1,655, not less than two-thirds of the appraised value, the interest of the appellants being appraised at \$1,969.68.

On May 31, following, the appellants objected to the confirmation of the sale for the reasons that the sale was not conducted in a proper and fair manner, and that the return of the sale by the officer was not in accordance with law.

In support of his motion A. M. Walrath stated in his affidavit, filed May 29, "that he appeared on the day of the sale of his land as the agent of his mother, Hannah Walrath, she not being able to appear in person, and at the time and place of sale notified the sheriff that he was a bidder for said farm as such agent; that the sheriff stated

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that W. C. Sloan (the county attorney) had notified him that he could not accept affiant's bid, it being affiant's farm that was being sold. Affiant says that he ceased to bid, thinking that perhaps there was some law said county attorney knew he was violating; and if it had not been for the statement of said county attorney, affiant as said agent would have been willing to have bought said farm at a higher bid of \$200 than it was sold for."

S. E. Bower stated in his affidavit, filed May 29, "that he was present at the sale of said farm by the sheriff; that Arlington M. Walrath made a bid at the sale, when W. C. Sloan, county attorney, stated that he did not think Walrath's bid could be accepted by said sheriff, or words to that effect."

Hannah Walrath stated in her affidavit, filed May 29, "that she was the mother of Arlington M. Walrath, whose farm was sold by the sheriff of Fillmore county on March 9, 1889; that her son was fully authorized to act for her as her agent, on said day, to bid for said farm at said sale; that she has over \$4,000 loaned out at four per cent per annum, and is fully able to purchase and pay for said farm."

F. B. Donisthorpe stated in his affidavit, filed May 29, "that he was present at the sale of said farm, under foreclosure proceedings by the sheriff, on March 9, 1889, and that the sheriff stated to affiant that W. C. Sloan (who is county attorney) had told him that he could not receive the bid of A. M. Walrath; that affiant stated to the sheriff that Walrath was bidding as the agent of his mother, Hannah Walrath, and that affiant knew of no law forbidding the sheriff accepting his bid; that said A. M. Walrath ceased to bid for said farm through the statement made by said Sloan; that said farm is one of the best in said county and would sell readily for \$2,200 at private sale; that only one party, other than Walrath, bid on said farm, and that said Sloan stated to affiant that the said party was the agent of Swartz Bros. & Co., defendants in said foreclosure proceedings."

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The following counter-affidavit was exhibited in support of the confirmation of the sale:

"W. I. Carson stated that he was sheriff of said county and conducted the sale of the real estate on the decree of foreclosure herein; that the defendant Walrath was present and made at least three several bids on said land; that affiant did not refuse to receive his bid, nor seek in any manner, or do any act or thing to prevent him from bidding, but told him if he did bid that he must be prepared to pay the cash as by law required, and thereupon said Walrath made the bids and ceased bidding wholly of his own motion."

On June 4, 1889, this proceeding came on to be heard by the court on the objections to the confirmation of the sale and to the sheriff's return not having been made to the first day of the term of the court, which objections were heard and overruled, and the sale confirmed and the sheriff ordered to make a deed in fee simple for the premises to the purchaser. To all of which the appellants excepted on the record.

It is apparent from the affidavits stated, and which were presented to the district court in resistance of the motion and proceedings to confirm the sale, and upon the motion of Walrath to set aside the sale, that there was a mischievous and unwarrantable interference with the bidding at the sale by the county attorney, and which interference was countenanced by the officer making the sale, and by him communicated to the bidder, by reason of which he ceased to bid, and the land was struck off to another bidder at a sum materially below its value, and below the amount which would have been bid for it had it not been for such interference.

It is of the utmost importance that judicial sales and all sales upon execution be conducted with entire fairness, and in cases where this peremptory rule is departed from in any degree to prevent the sale of property at its full value,

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such sales ought not to be confirmed, but ought to be set aside.

The order of the district court confirming said sale is reversed, the sale is set aside, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

ELIJAH FILLEY V. PERRY WALKER ET AL.

[FILED JANUARY 28, 1890.]

1. Instructions given and refused examined, and *held*, rightly given and refused, except as to the ninth instruction, which, in so far as it relates to the defendant's set-off of \$14, money borrowed of defendant, is overruled as error.
2. An Assignment of Error, based upon the overruling of twenty-two objections to testimony on trial, no ground of objection to either or any of the rulings being suggested or argued by counsel, is overruled *pro forma*.
3. The Evidence examined, and *held*, to sustain the verdict, except as to the \$14, borrowed money and interest.

ERROR to the district court for Gage county. Tried below before BROADY, J.

L. W. Colby, and *R. S. Bibb*, for plaintiff in error, cited, on the first assignment of error: 2 Benjamin on Sales (Corbin), 1016-17; on the eighth and fourteenth assignments: Code, secs. 29, 42; *Mills v. Murry*, 1 Neb., 327; *Kellogg v. Lavender*, 9 Id., 419; *Mattis v. Boggs*, 19 Id., 698; Maxwell, Pl. & Pr., 33; Bliss, Code Pl., secs. 61, 62; on the thirteenth assignment: *Markel v. Moudy*, 11

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Neb., 213, *Kersonbrock v. Martin*, 12 Id., 376; *City of Lincoln v. Beckman*, 23 Id., 682.

Griggs & Rinaker, and *Allen Beeson*, *contra*, cited, as to the third assignment: *Dubois v. Canal Co.*, 4 Wend. [N. Y.], 289; *Peltier v. Sewall*, 12 Id., 388; *Mead v. DeGolyer*, 16 Id., 636; *Graves v. White*, 87 N. Y., 465; *Sawyer v. Chicago & N. W. R. Co.*, 22 Wis., 410. .

COBB, CH. J.

The defendants in error, Perry Walker and Samuel Barker, as partners in business under the name of Walker & Barker, brought suit against the plaintiff in error, Elijah Filley, in the district court of Gage county, to recover the sum of \$5,138.18, alleging that in April, 1883, they contracted with the defendant for the purchase and delivery of 354 head of fat cattle [which amount was subsequently increased to 366 cattle and 51 head of hogs] and paid defendant thereon, April 5, 1883, \$3,000, and on May 17, following, \$1,000, and on June 22, following, \$1,000; that of said number of steers the defendant delivered to plaintiffs 235 head, which were paid for in full, over and above former payments to defendant, at the time of delivery, and that the defendant refused and neglected to deliver the balance, 117 head of cattle, and refused to refund to the plaintiffs the amount of said former payments, aggregating \$5,000, for which sum, with interest, this suit was brought.

For a second cause of action it was alleged that on June 20, 1883, at the time of the delivery of said cattle, there were two steers left with defendant which were not loaded on cars for transportation for want of room in the car, the steers having been paid for at the price of \$138.18, and not subsequently delivered to the plaintiffs upon demand thereof.

The defendant answered in the court below, setting up

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that on April 5, 1883, he entered into an agreement with said Walker for the sale and delivery of 366 head of cattle and 51 head of hogs at various places, to-wit:

Twenty head, at \$6.25 per 100 pounds, to be delivered at Wilber on May 8, 1883, obtained from Henry Albert.

Thirty-seven head, at \$6.25 per 100 pounds, to be delivered at Wilber in the first week in May, purchased from Wm. Steinmeyer.

Nine head, at \$6.25 per 100 pounds, to be delivered at Wilber on May 15, 1883, purchased from G. H. Ross.

Thirty-eight head, at \$6.25 per 100 pounds, to be delivered at Firth on May 15, 1883, purchased from John Yohe.

Fifty-six head, at \$6.25 per 100 pounds, to be delivered at Firth on June 1, 1883, purchased from W. J. Harms.

Fifty head, at \$6.25 per 100 pounds, to be delivered at Firth on June 15, 1883, purchased from J. M. Messerve.

Twenty head, at \$6.25 per 100 pounds, to be delivered at Liberty on June 1, 1883, purchased of W. J. Dewey.

Fifty-one head of hogs, at \$6.50 per 100 pounds, to be delivered at Hubbell.

Nineteen head of steers and one stag, at \$6.25 per 100 pounds, delivered at Hubbell, both lots on June 1, 1883, purchased of Robert Kyle.

Seventy-four head of steers, at \$6.25 per 100 pounds, to be delivered at Kerr's farm in Gage county June 1, 1883, purchased of Andrew Kerr.

Forty-three head of steers, at \$6.25 per 100 pounds, to be delivered at Filley's farm June 15, 1883, the defendant's herd of cattle.

That plaintiffs paid defendant thereon the sum of \$3,000, and that on said April 5, 1883, defendant entered into a further agreement with said Walker, representing the plaintiffs, for the sale and delivery of eight or more car loads of cattle at various stations on the line of the railroad at \$6.25 per 100 pounds on or before the first of June following.

That accordingly he purchased 150 head of cattle, making over eight car loads, and offered to deliver them at the following stations of the Burlington & Missouri railroad:

Thirty-five head at Beatrice, purchased of W. W. Barnhouse.

Eighty head at Hubbell, purchased of George Tuttle.

Thirty-five head at Beatrice, purchased of Andrew Kerr.

That at the date for delivery, the market price having declined, Walker, on behalf of the plaintiffs, objected to receiving the cattle, and declined to comply with his agreement, it was then mutually agreed by defendant and by Walker, on behalf of the plaintiffs, that defendant should ship the eight car loads of cattle to Chicago, and deduct from the purchase price of \$6 per 100 pounds one-third of all losses on sale in Chicago; that accordingly defendant shipped the 153 steers, and sold the same at Chicago, realizing, after deducting the expenses of shipment, the sum of \$9,754.27, at weight of 202,560 pounds, costing, at \$6 per 100, \$12,153.60; that the loss amounted to \$2,399.33; deducting defendant's one-third of the same the plaintiffs' loss was \$1,599.54; that on May 18, 1883, Walker paid defendant, on this agreement of compromise, \$1,000. The defendant alleges that in all of the transactions mentioned in his answer the said Perry Walker acted for himself and the said Samuel Barker as partners, and that on June 21, 1883, defendant loaned said Walker three several sums of money, amounting to \$14, to be paid on demand, which is due and unpaid.

The defendant alleges that he complied with his agreement by delivering the twenty head of steers purchased of Henry Albert, and the thirty-seven head purchased of Wm. Steinmeyer, and the nine head purchased of G. H. Ross on May 1, 1883, and was ready and willing to deliver all of said cattle and hogs, but, at the request of plaintiffs he caused the cattle and hogs to be held beyond the time of delivery agreed upon as follows: thirty-eight head of steers

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of Yohe until June 20 following, when they were delivered, the expense of keeping for the time extended being \$45, which the plaintiffs were to pay; the fifty-six head of steers of Harms until June 20, when they were delivered, the expense of keeping for the time extended being \$35.15, which the plaintiffs were to pay; the fifty head of steers from Messerve until June 20, when they were delivered, the expense of keeping for the time extended being \$15, which the plaintiffs were to pay; the twenty head of steers from Dewey until June 21, when they were delivered, the expense of keeping for the time extended being \$10, which the plaintiffs were to pay; the forty-three head of cattle of defendant's herd until July 13, when they were delivered, the expense of keeping for the time extended being \$107.50, which the plaintiffs were to pay; theseventy-four head of cattle of Andrew Kerr until July 13, when they were delivered, the expense of keeping for the time extended having been paid by the plaintiffs.

That the defendant offered to perform his agreement, and deliver to the plaintiffs all the said cattle, and demanded that the plaintiffs perform their agreement and receive the cattle, and pay for the same according to the terms of their agreement, which they refused to do; and thereupon, upon due notice to the plaintiffs, the defendant transported and marketed the said 117 head of cattle and sold the same in Chicago, Illinois, at the highest market price, to-wit, the sum of \$7,954.06 net, and with the 117 head of cattle, also at the plaintiffs' request, shipped to Chicago and sold the two head of steers which theretofore had been returned and left with defendant for keeping, at an expense of \$15, which the plaintiffs were to pay, and which steers were sold at the highest market price, \$114.92 net, and that the time and money necessarily expended in the transportation and sale of the cattle was \$100, for which the plaintiffs are indebted to defendant.

The defendant further alleges that the following account

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stated is a correct statement of the whole of the transactions mentioned, including the number of cattle bought and sold, their weight in the market, and the amount of proceeds received:

366 head of cattle, weighing 472,487 lbs., at \$6.25	\$29530 43
51 hogs, weighing 17,925 lbs., at \$6.50.....	1165 12
For keeping hogs and cattle during time ex- tended.....	232 65
Money loaned.....	14 00
Two-thirds loss on 150 head of cattle (8 car loads).....	1599 54
Money and services of Filley in shipment and sale of 119 cattle	100 00
Keeping and caring for two steers.....	15 00
Total.....	<u>\$32656 74</u>

CREDITS.

1883.

April 5th, cash	\$3000 00	
May 18th, cash	5000 00	
May 18th, cash	1000 00	
June 19th, cash	10000 00	
June 23d, cash	5559 00	
July 17th, cash, proceeds of two steers.....	114 92	
July 17th, cash, proceeds of 117 steers.....	7954 06	
Total.....	<u>\$32652 98</u>	32652 98
Balance due Filley		<u>\$3 76</u>

And the defendant Filley's answer further alleged that the foregoing was all the transactions between the said Filley and the said Walker and Barker, or either of them, and that the transactions stated in the plaintiff's peti-

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tion are not otherwise than as stated in said answer; that he does not know whether the plaintiffs, Perry Walker and Samuel Barker, were partners, as alleged in said petition, or not; that said action is not brought in the names of the real parties in interest; that one D. S. Draper is equally interested with the said Walker and Barker in the event of this suit; and he denies each and every allegation in the petition, excepting such matters as are admitted, and asks judgment in the sum of \$3.76 and costs of suit.

The plaintiffs replied and set up that on the 5th day of April, 1883, they contracted with the defendant to purchase from him 352 head of fat cattle, and not 366 as averred, but that afterwards they agreed the number should be increased to 366, and exhibit a true statement of their account of purchase as follows:

1883.	No. and Kind Delivered.	Owned by	Paid for keeping.	Total Amt. Paid.
May 1	37 head of cattle...	W. Steinmeyer..	.....	\$2987 50
May 1	20 head of cattle...	H. Albert.....	.....	1551 25
May 1	9 head of cattle....	G. H. Ross.....	.....	586 35
June 20	38 head of cattle...	John Yohe.....	\$45 00	3126 87
June 20	56 head of cattle...	W. J. Harms.....	35 15	4429 81
June 21	50 head of cattle...	J. M. Messerve..	.....	3676 06
June 21	20 head of cattle...	W. J. Dewey.....	.....	1658 37
June 22	19 head of cattle...	Robert Kyle.....	.....	1489 50
June 22	51 head of hogs.....	Robert Kyle.....	.....	1165 12
				\$20570 73

That for the extra trouble of defendant occasioned by the plaintiff's delay in receiving a portion of the cattle, plaintiffs delivered to the defendant a sow and seven pigs, which the defendant accepted in full payment of his extra trouble; that plaintiffs deny that they promised to pay the defendant any sum whatever by reason of failing to accept a portion of the cattle within the time agreed upon, but on the contrary the defendant agreed with them to make no charges whatever therefor; that they also paid the defendant the sum of \$14 borrowed money, and that they did not

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make any arrangement for the purchase of any cattle in addition to the 366 head mentioned, and that the matters set forth in the defendant's answer show a partnership between all the parties to the suit, and the plaintiffs deny each and every allegation in the answer contained.

The case was tried to a jury upon the issues joined, who found for plaintiffs, Walker and Barker, in the sum of \$5,553.90; a motion for new trial was made, overruled, exceptions taken and judgment rendered on the verdict, to reverse which the defendant in the lower court, plaintiff in error herein, brings the case to this court by proceedings in error.

There are thirteen errors assigned, and sixteen presented by the counsel in their brief, which will be examined in their order, so far as necessary to a proper understanding of the case. Of these, fourteen are based on instructions given by the court to the jury.

1. That the court erred in instructing the jury, at the request of the plaintiffs, that if they found from the evidence that the defendant offered to deliver the 117 head of cattle in question, but coupled with such offer, as a condition, or demand, that plaintiffs should pay an additional sum, claimed to be due from them on another matter or contract, such act and demand was no sufficient offer to deliver the 117 head of cattle; defendant having no legal right to make his offer of delivery conditioned upon compliance with an agreement not connected with the delivery of the 117 head of cattle."

It is objected to this instruction that the court tells the jury that the transaction relating to the eight car loads of cattle was not connected with the delivery of the 117 head, while the claim of defendant, in the pleadings and the evidence, was that it was the same transaction, and whether it was so, or was not, was one of the questions in the case which the jury alone should have found.

It will be seen from the defendant's answer, *supra*, that

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he alleges that on April 5, 1883, he contracted with Walker for the sale and delivery of 366 head of cattle and fifty-one hogs, and was paid thereon \$3,000. And on the same day he entered into a further agreement with Walker, representing the plaintiffs, for the sale and delivery of eight or more car loads of cattle, at various stations on the line of the railroad, at \$6.25 per 100 pounds, on or before June 1, 1883, with the statement that he purchased the eight car loads of cattle, and the hogs, from the various parties specified; and at the date of delivery the price of the live stock having declined in the market, Walker, on behalf of the plaintiffs, objected to receiving the cattle on that account, and it was then mutually agreed by Walker, on behalf of the plaintiffs, that defendant should ship the eight car loads of cattle to Chicago, Illinois, and deduct, from the price of \$6 per 100 pounds, *one-third* of all losses on sales in Chicago; and accordingly defendant shipped 153 steers and sold the same in Chicago—in the words of the answer, “realizing, after deducting the expenses of shipment, the sum of \$9,754.27 at weight of 202,560 pounds, costing, at \$6 per 100 pounds, \$12,153.60; that the loss amounted to \$2,399.33, and deducting defendant’s one-third of the same, the plaintiffs’ loss was \$1,599.54, and that on May 18, 1883, Walker paid defendant, on this agreement of compromise, \$1,000.

From this pleading, it is clear that the defendant claimed the latter transaction to have been separate and distinct from the cause of action set out in the plaintiffs’ petition. Aside from the fact that it is claimed that both contracts were made on the same day, they are distinct and distinguished from each other in important respects. It is true both relate to the purchase of cattle, and, as alleged, originally at the same price under both. But in the first instance the cattle were specifically described as from original owners, with dates and places of delivery as set up by the plaintiffs, and admitted by defendant, differing in these respects from

the several lots of cattle claimed to have constituted the eight car loads alleged to have been bargained for in the second instance. It appears from evidence that the defendant claimed, in marketing the eight car loads of cattle, that there was a gross loss of \$2,399.33, and that he refused to deliver to plaintiffs the remaining 119 head of cattle, under the first contract, unless and until the plaintiffs also paid him the sum of \$1,599.54 as their share of losses on the eight car loads.

Now, I do not consider that the trial court erred in designating, in its charge, this sum of \$1,599.54 as "an additional sum claimed to be due upon another matter or contract." Without examining critically, a second time, through the voluminous pages of the record to discover every particle of testimony applicable to this question, I will observe that the defendant having treated the two contracts as separate and distinct, no amount of testimony on his part would tend to change the issues under the pleadings.

While it is admitted that the defendant had a right to demand the full amount due on the original purchase of 366 cattle, as a condition of the delivery of the remaining 119, he had no right to demand also, as a condition to the delivery, an additional sum which the plaintiffs may have owed him on any other account whatever.

2. That the court erred in instructing the jury, at the request of the plaintiffs, "that if they believed from the evidence that the defendant refused to deliver the 117 head of cattle, unless Walker would pay him a balance claimed to be due him on another deal, then it would not be necessary for Walker to tender him the balance due on the 117 head, and if they should find from the evidence that by the usual course of dealings between the parties all the payments had been made by Walker's checks, without objections by defendant and that at the time the 117 head of cattle were shipped, Walker offered to receive them and to give his check for the balance due, and defendant did not

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object to receiving a check in payment, but only objected to the amount because it did not include the balance claimed to be due from Walker on another deal, and refused to deliver the cattle for that reason alone, then Walker would have a right to treat the contract for the 117 head of cattle as at an end, and he would be entitled to recover back the amount previously paid on the 117 head," to which was added by the court, "if you find the other material averments of the petition in the plaintiffs' favor."

The plaintiff in error contends that this instruction is not based upon the evidence, and is not within the rule of law. While the evidence doubtless is conflicting, yet there is evidence in the bill of exceptions fully sufficient to support the instruction. The plaintiff Walker, in his testimony, after restating the purchase by plaintiffs from defendant of the 366 head of fat cattle and 51 hogs, and the receipt of all except 117 head of cattle, and the time and manner of payment, and the leaving of two steers with the defendant to be redelivered with the remaining 117 head, testifies as follows:

Q. After receiving the cattle, as stated, how many were still remaining to be received of the 366 head?

A. There were 117 head besides the steers I had paid for that Filley kept; there were two steers at Alberts that I could not put in the car; there were twenty there and I could not put in but eighteen, and Filley had a car load of steers he was taking to his place, and said he would take these along with his and keep them until he shipped his cattle, free of charge.

Q. Had you already paid for them?

A. Yes, I had paid for them.

Q. What did the two come to, and what did you pay for them?

A. They came to \$138.18.

Q. Did you ever receive these cattle, and do you know what became of them?

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A. No, sir, I did not, and I do not.

Q. Did Filley ever tell you what he did with them?

A. He sent me a statement in regard to them.

Q. Has he ever paid you anything on account of them?

A. No, sir.

Q. At the time you received the cattle, as stated, all but the 117 head, was there any amount still remaining to be paid on the part of these cattle from you and Barker to Filley, or were they fully paid for at the time they were received?

A. All that I received were fully paid for.

Q. Were they paid for independent of the \$3,000 check, and \$1,000, and independent of the Kerr check of \$1,000?

A. Yes, they were.

Q. That left \$5,000 in Filley's hands?

A. Yes.

Q. And two steers?

A. And the two steers, yes.

Q. Did you ever get the 117 head of steers?

A. No, sir.

Q. State the facts in regard to them; who were the 117 head of cattle to come from?

A. There were seventy-four head to come from Kerr, and forty-three from Filley.

Q. Did you ever get them, and how came it that you did not?

A. No, sir, I never got them. When I went there for them Filley claimed that I owed him for some more cattle that he had shipped himself. I told him that I would have nothing to do with them. He wanted that I should pay the losses on some more cattle, and I told him that I would not have anything to do with it, and would not pay it, and he said I could not have the 117 head unless I did pay it.

Q. Did you pay him, there and then, the amount he claimed?

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A. No.

Q. What became of the 117 head of cattle?

A. Filley kept them.

Q. Do you know what he did with them?

A. He said he shipped them and I saw them on the cars.

Q. What did he say in regard to delivering them to you?

A. He said I could not have them, unless I would pay the losses on eight car loads that he claimed I had a two-thirds interest in. He said there were six car loads of the eight that had been shipped, and two car loads that had not been shipped. On these two car loads he estimated the losses.

Q. Do you remember what the amount of damages was that you should pay before he would let you have the 117 head?

A. I made a memorandum of it at the time I demanded the cattle, down there at the town of Filley, which I have here.

Q. From that, can you tell how much he demanded of you?

A. Yes; he demanded \$6,692.76.

Q. And what part of that was for the losses on these eight car loads?

A. There was \$1,504.83.

In his subsequent testimony he also states that at the same time and occasion he produced his check book and offered to draw a bank check in favor of the defendant for the price of the 117 head of cattle remaining undelivered, and that defendant replied to the witness that he need not draw it, that he, defendant, would not receive it unless there was included in the check the amount of losses claimed on the eight car loads of cattle mentioned.

This is believed to have been a sufficient tender of the price, or, in other words, superseded a technical tender of

either legal or current money for the 117 cattle, and to my mind fully justified the instruction of the court.

3. The third error presented and argued is on the instruction of the court on its own motion, that "the plaintiffs allege that they bargained for 117 head of cattle from defendant; that they advanced to defendant on the agreed price \$5,000; that they were ready and willing to comply with their part of the contract, pay for and receive the cattle accordingly; that defendant, in violation of his part of the contract, refused to deliver the 117 head of cattle, and that plaintiffs ask to recover the \$5,000 with interest. The plaintiffs also seek to recover the value of two other cattle in defendant's possession which he failed to account for.

The objection of plaintiff in error to this instruction is that it is not a correct statement of the allegations in the first cause of action in plaintiffs' petition.

It is true that the petition alleges the purchase by plaintiffs from defendant of 354 head of fat cattle and payment thereon, April 5, 1883, of \$3,000, and on May 17, \$1,000, and on June 22, \$1,000, but it also alleges that at the time of the purchase 235 head of cattle were delivered and "were fully paid for on delivery over and above the former payments."

This was such a severance of the contract in the pleadings that, being followed up by the evidence as it was, not only justified but called for the instruction as given by the court. It could not have misled or confused the jury, which an instruction setting out the original contract and the severance making the action apply only to the 117 head of cattle, as set up in the first cause of action, would have been more likely to have done. The contract being severable, and actually severed by the parties, as shown by the pleadings, and by, at least, considerable evidence, the original contract or that part performed, is only necessary to be considered for the purpose of properly distinguishing that part of it which remaining unperformed, as alleged

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by the plaintiffs below, constituted the ground of litigation.

The cases cited by counsel for defendants in error, especially those of *Sawyer v. R. R. Co.*, 22 Wis., 403; *Graves v. White*, 87 N. Y., 463, and *DuBois v. Canal Co.*, 4 Wend. 285, fairly sustain this instruction. I quote the syllabus from the Wisconsin case:

"A contract to deliver 300 barrels of flour in lots of 100 each, payment to be made for each lot on delivery, is *severable*; and acceptance of payment for the last two lots on delivery was not a waiver of any rights of the seller arising out of the unauthorized delivery of the first lot by the railroad company without payment made."

Also that of *DuBois v. The Canal Company*: "There is not, it *seems*, any precise rule, which, when applied to the breach of a contract, certainly settles the question whether it is thereby abandoned or not; but if the act of one party be such as necessarily to prevent the other from performing on his part, according to the terms of the agreement, the contract will be considered as rescinded, and the party may resort to his *quantum meruit*."

It is the contention of the defendants in error—of which there is evidence to sustain—that they had contracted to purchase from the plaintiff in error 366 head of fat cattle at \$6.25 per 100 pounds, that they had received and paid for all except 117 head, and had advanced to the plaintiff in error \$5,000 on the 117 head, which the plaintiff in error refused to deliver under the said contract. Upon the principle of the authority cited, the defendants in error could treat the contract as severable, and that part remaining unexecuted as rescinded, and sue for the return of the money advanced on the unexecuted and rescinded portion.

4. This assignment of error is based upon the instruction of the court, of its own motion, that "the defendant in his answer, in addition to his answer to the cause of action stated in the petition, consisting principally of de-

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nials, sets up an affirmative defense by way of set-offs. The substance of the set-off is that on April 5, 1883, plaintiffs agreed to purchase of defendant eight or more car loads of cattle at \$6.25 per hundred pounds; that defendant, in compliance with such agreement, purchased over eight car loads of cattle, and offered the same to plaintiffs on April 30, 1883; that on said day the market having declined, the plaintiffs and defendant agreed that defendant should ship the eight car loads of cattle to Chicago, and deduct from the purchase price, of \$6 per hundred pounds, one-third of all losses on the sale of said cattle in Chicago; that defendant accordingly shipped and sold the eight car loads of cattle, the same amounting to 153 cattle, in which the plaintiffs had two-thirds and defendant one-third interest; that the defendant asks against plaintiffs an account of this set-off, which he pleads in his answer, \$1,599.54 and interest. The answer further alleges loans to the amount of \$14 by defendant to plaintiffs, and some further claim for keeping cattle and hogs on time extended, and for time, money, and services in shipment and sale, which you will see more fully in the answer."

It is objected that this instruction is not a fair statement of the facts set forth in the defendant's answer, inasmuch as it intimates that the answer consists principally of denials, when the very contrary is claimed.

It is scarcely necessary to say that the learned judge, in this charge, does not intimate that the answer consisted principally in denials, but, by way of recital, it is intimated that the answer, in direct reply to the allegations of the petition, consisted principally of denials; and this is usually the privilege of an answer to allegations of an adverse party. It is rarely that admissions of the cause of action are indulged in, or denials of the allegations of a petition are refrained from, whether they be true in fact, or merely conjectural. The instruction is principally confined to the substance of the set-off pleaded by defendant. It is not

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suggested that the substance is not plainly and fully set out in the instruction; and I fail to see wherein it is either deficient or unfair in that respect. It informed the jury of the nature and substance of the defendant's claim to offset the demand of the plaintiffs, and left its merits to their discretion.

5. That the court erred in instructing briefly, of its own motion, that "the plaintiffs' reply denies the new matter contained in the answer, and alleges certain payments as shown in the reply."

The objection offered to this instruction is that it is incomplete, and insufficient to answer the issues involved. It is not suggested that it presents an erroneous fact or principle, or misleads the jury as to the issues. It is common on the trial of important causes to a jury, when, in the opinion of counsel engaged, the court fails to make its charge sufficiently comprehensive and impartial, and to fully present the issues involved, to present instructions, prepared by counsel, with requests to the court to give them to the jury, covering such points as may have been overlooked or omitted, and making complete that which seemed to be deficient. The fact that neither instructions nor requests were presented, or made, by the counsel who tried the case for the defendant, in the court below, forces the conclusion that additional instructions were not deemed necessary when the case was submitted to the jury. And the fact that no authority or precedent is cited in the brief to sustain the objection of counsel, goes far to warrant the opinion that there is no reversible error in the instruction, or in what, from its brevity, it fails to instruct the jury.

6. This error is based upon the court's instruction, of its own motion, as follows:

"As to the plaintiffs' second cause stated in his petition, it is not deemed necessary to give you further instructions. The jury will determine from the evidence whether the plaintiffs should recover thereon for the two steers.

"As to small money items alleged in the answer outside the set-off above described, defendant pleads it is not deemed necessary to give you further instructions; the jury will determine from the evidence whether the defendant has made out a case thereon, or any part thereof. But as to the plaintiffs' first cause of action for money paid on bargain for the 117 cattle, something more may be added, and then something relating to the set-off, concerning eight car loads of cattle pleaded in the answer."

The second cause of action referred to is, in substance, that on June 20, 1883, at the time of the delivery of the 235 head of fat cattle, by defendant to plaintiffs, two steers of the number delivered were turned back and left with the defendant for lack of railroad transportation at the time; that the plaintiffs afterwards demanded the steers of the defendant, who refused to deliver them or to pay their value of \$138.18.

The defendant in his answer, among other charges against the plaintiffs, debits them with the charge of \$15 for the keeping and caring for the two steers, and among the credits allowed plaintiffs, in their whole transactions, is that of "\$114.92 for the sale of two steers July 17, 1883."

This instruction, in my view, fairly submits the proposition whether the two steers, the ownership of which, in the plaintiffs, is admitted by defendant's answer, and the sale of which, by defendant, is also admitted, be charged to the defendant on the theory of the plaintiffs, expressed in their second cause of action, or upon that of the defendant, as set up in his answer.

The court might well have used stronger expressions, and at greater length in its instruction, but it is doubtful if it would have been clearer to the comprehension of the jury; and, on the contrary, it is probable that cumulative illustrations, rather than enlightening the jury upon the issues, would have tended to confuse them.

7. The seventh error argued in the brief, is based upon the fifth instruction of the court, of its own motion, which appears to have been but a summary and repetition of the first, second, and third instructions ruled upon, and will not be further considered.

8. The eighth error argued is based upon the sixth instruction of the court, of its own motion, that "if there was such a contract as stated in the first cause of action in the petition, and the plaintiff Walker, on behalf of himself and plaintiff Barker with defendant, and afterwards plaintiff Barker, without the knowledge and consent of plaintiff Walker, sold one-half his (Barker's) interest in the cattle to the witness Draper, that would not make Draper jointly interested with these plaintiffs in such a way as to be a bar to plaintiffs' recovery in this action, but, on the contrary, plaintiffs would still be the real parties in interest for the purposes of this action."

The plaintiffs allege that at the time of the transaction constituting their cause of action they were partners in the name of Walker & Barker, and the defendant in his amended answer alleged that he was informed and believed "that the plaintiff Walker, in all the transactions mentioned in the amended answer (referring to the amendment of his answer on which the suit was to be tried) acted for himself and his partner Barker, and so alleged the fact to be."

There is evidence to the effect that after the original purchase by Walker and Barker of the fat cattle, as alleged in their petition, one Draper bargained with Barker to share with him equally in the cattle deal.

Walker, in his testimony, states that he never agreed to this arrangement between Barker and Draper, nor was he aware of its existence until after the events leading up to this suit.

The question presented is whether the agreement of Barker and Draper constituted Draper an indispensable

party to this action against defendant for moneys advanced on a contract for cattle which the defendant failed to deliver. The only citation of authority to this question is that of counsel for defendants in error to Lindley on Partnership, pp. 363-4*—that "it is one of the fundamental principles of partnership law that no person can be introduced as a partner without the consent of all those who, for the time being, are members of the firm." (*Tabb v. Gist*, 1 Brock., 33.) This authority supports the instruction and the principle involved, and is believed to be a correct rule. The logic of it, and the extent of our decision is that under the pleadings and evidence in this action, Walker and Barker are the sole parties in interest as plaintiffs, and that the action is brought in the name of the proper parties.

9. The ninth assignment is based upon the seventh instruction of the court of its own motion, that "the burden of proof is upon the plaintiffs to make out their case by a preponderance of the evidence, as to each cause of action stated in the petition; and as to each cause of action, if they have done so, they should recover, and if not, they should fail."

The objection of the plaintiff in error to this instruction is stated to be that under the pleadings the plaintiffs might make out their case as to each cause of action stated in the petition by a preponderance of evidence and still fail to recover, as the defendant's claim, set forth in the answer, exceeded that of the plaintiffs. This, as I understand it, is not literally true, and were it, by reference to the words of the instruction it is to be understood, and doubtless was by the jury, as referring to the issues made up by the pleadings upon each cause of action as set out, and is therefore correct.

10. The tenth error assigned is based upon the eighth instruction of the court, of its own motion; but as no criticism is offered as to the legal propriety of the charge, and

no material error discovered in its application to the issues to be tried, it will not now be further considered.

11. The eleventh error assigned is based upon the ninth instruction of the court, of its own motion, that "the burden of proof is upon defendant to make out his set-offs pleaded in his answer, by a preponderance of the evidence, and if he has done so, he should recover thereon, and if not, he should fail thereon."

Upon this error counsel say that the court failed to remember that the plaintiffs admitted the \$14 of borrowed money and pleaded payment, and that they also admitted in their reply other charges and expenses set up in the answer, but pleaded that it was settled for by the transfer of a sow and seven pigs. By these admissions the burden of proof was laid on the plaintiffs to prove the payments and settlements. This objection appears to be well taken, so far as relates to the charge of \$14 borrowed money, but not as to "other charges and expenses," set up in the answer, "for the trouble of requesting the persons of whom the stock was purchased to hold the same for a longer period than that provided by the original contract"; and on that point I quote the third and fourth paragraphs of the plaintiffs' reply:

"3. That for the extra trouble of defendant, occasioned by the delay of plaintiffs in receiving a portion of said cattle, plaintiffs delivered to defendant a sow and seven pigs, which defendant accepted in full payment for his said trouble."

"4. That they deny that they promised to pay defendant any sum whatever by reason of their failure to accept a portion of said cattle within the time agreed upon; but, on the contrary, the defendant agreed with them to make no charge whatever therefor."

This reply of the plaintiffs was wholly gratuitous on their part, as neither in the answer of the defendant nor the tabular statement accompanying it is there any charge

for "the extra trouble" mentioned, or for any services occasioned by the plaintiffs' delay in accepting a portion of the cattle. So that these paragraphs of the plaintiffs' pleadings, as well as their sow and pigs, were mere gratuities.

12. The twelfth error is based on the tenth instruction of the court, of its own motion, that "inasmuch as something has been said about unsettled partnership account, in reference to the eight car loads of cattle, you are instructed that if the set-off claimed on account of the eight car loads involved an unsettled partnership accounts, it could not be utilized as a set-off in this action. But a purchaser of an undivided interest in certain cattle, under an agreement to market them and apportion profits or losses among the joint owners in proportion to their respective shares does not constitute a partnership; but an agreement to buy and sell jointly and share profits and losses, would constitute a partnership agreement."

The objection offered by counsel is, that the instruction is not clear, explicit, and definite, and that it would tend to mislead the jury; but these abstract objections do not discover particular errors of sufficient importance to be further considered; and as none are obvious to the writer, he refrains from discussing it.

13. The thirteenth error is to the eleventh instruction of the court, of its own motion, as follows: "The three controversies in the case to which the court specially invites your attention are: On what was the payment of the \$1,000 by check to defendant, which plaintiff Walker testified was paid on the 117 cattle, and defendant testified was paid on the eight car load agreement, made? On what was the payment of \$1,000 by check to witness Kerr, which plaintiff Walker testifies was paid on the 117 cattle, and witness Kerr testifies was paid to him for keeping certain cattle longer, made? And is defendant entitled to recover on the set-off relating to the eight car loads of cattle as pleaded in the answer?"

The objection of counsel is that the instruction gives undue prominence to three branches of the case, to the disparagement of other considerations. The three controverted points are carefully stated, and appear to be the important questions in the controversy to which the attention of both the court and jury should have been specially directed. The minor questions had been already considered, so that in again referring to these three more important ones, in the manner stated, no injustice was done. No prominence is given to "one branch or item of evidence," nor mention of the evidence on one side to the prejudice of the other. The court merely points to the three principal questions which, from conflicting evidence bearing thereon, are particularly entitled to be carefully considered.

14. This error is based upon the refusal of the court to instruct the jury at the request of the defendant as follows: "The court instructs the jury that if they believe from the evidence in this action that D. S. Draper was a copartner with Perry Walker and Samuel Barker in the purchase of the cattle in controversy, and has an interest in the amount sought to be recovered in this action, and that D. S. Draper is one of the real parties in interest in said amount claimed, then the jury should find for the defendant."

This request, in its application to the issues, is nearly, if not altogether, the antithesis of the sixth instruction already considered in the eighth assignment of errors. If that instruction was properly given, as held to be, then, of necessity, the defendant's request was properly refused.

15. The fifteenth error assigned is the overruling of the defendant's objections to twenty-two separate questions propounded by plaintiffs to witnesses on the trial.

As counsel in their brief have declined to point out specifically wherein either or any of these questions were improper, or wherein any were erroneously overruled, and the errors not being obvious of themselves, they will not be further considered here.

16. The sixteenth and final error assigned is that the verdict is not sustained by sufficient evidence and is contrary to law.

To this error the brief is confined to the question of Draper's interest in the matter of the suit.

Upon a careful reading of the record, and an examination of the authorities cited, I have reached the conclusion that the verdict is supported by the evidence, with the one exception mentioned of the \$14 borrowed money. Upon that sum the evidence is still sufficient to sustain the verdict, but for the misdirection of the court as to the weight of evidence applicable to that claim it will be held, to that extent, that the verdict is unsustainable and set aside.

The judgment of the district court is therefore reversed unless the plaintiffs below shall, within twenty days from the date of the filing of this opinion, enter a remittitur in this court of the sum of \$14 as of the date of the rendition of the judgment in the district court, but in case such remittitur is entered within the time specified the judgment in all other respects is affirmed.

February 18, 1890. The above remittitur having been filed the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JOHN PRALL V. B. S. SAWYER.

[FILED JANUARY 28, 1890.]

The Evidence examined and considered, and *held*, to sustain the verdict.

ERROR to the district court for Valley county. Tried below before HARRISON, J.

A. S. Moon, for plaintiff in error.

A. M. Robbins, *contra*.

COBB, CH. J.

This cause is brought on error from the district court of Valley county.

The plaintiff below alleged that in May, 1887, he bargained with the defendant to sell him 219 head of cattle, and to receive in part payment four ponies and two mares at the price of \$1,200, and to keep the cattle for thirty days prior to the delivery; that the bay mare "Maggie Mitchell" and the sorrel mare "Queen," in said payment, were represented by defendant before, and at the time of, the purchase as thoroughbred, pedigreed stock; that one was registered, and that he held the authenticated pedigrees of both, taken from the horseman's stock book, as thoroughbred horses, and that he would furnish, immediately upon the consummation of the sale, sufficient proof of the pedigree of the other mare to entitle plaintiff to have her registered as a pure blooded or thoroughbred mare, and by reason thereof they were worth \$800 each; that in said bargain and sale the mares were estimated at \$500 each, but that plaintiff was ignorant of that class of horses that the mares were so represented to be of, and relied solely upon the

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representations of defendant as to their pedigree and value; that his purpose in purchasing them at an exorbitant price was that of breeding thoroughbred horses, which was stated to and understood by defendant; that had said representations been true, the mares would have reasonably been worth, for such purpose, \$500 each, but that said representations were false and untrue, and were known to be such by defendant at the times they were so made; that the mares were not of value to exceed \$100 each, and by such false and fraudulent representations the plaintiff has been damaged in the sum of \$800.

The plaintiff further alleges that the defendant did not receive and take away the cattle bargained for at the expiration of thirty days, but left them until late in the fall season of 1887, and that it was reasonably worth the sum of seventy-five cents per head of 107 head so left to be cared for, amounting to \$80.30, which is due and unpaid. The plaintiff asks judgment for \$880.30.

The defendant answered, and admitted that in May, 1887, he contracted with plaintiff for 219 head of cattle, to be kept for him for thirty days; that as a part payment he traded to the plaintiff ten head of horses; and denied each and every other allegation of the plaintiff.

The defendant set up that the plaintiff is indebted to him in \$210, in this, that at the time of the purchase of the cattle the plaintiff guaranteed that of the 219 head not less than 60 should be two and three-year-old steers, fit for feeding in the fall of 1887, but that there were not to exceed 39 head so fit for feeding, that the remaining 21 were cows, heifers, yearlings, and calves, and that the difference in value was \$10 per head less for those delivered than those contracted for, by reason of which the defendant was damaged in \$210, for which he asks judgment.

The plaintiff replied and denied every allegation set up in the defendant's answer, except such as admit the truth of his petition.

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There was a trial to a jury with findings and a verdict for the plaintiff of \$400 damages, upon which judgment was entered for that sum, and \$174.25, costs of suit.

The defendant's motion for a new trial being overruled the cause was brought to this court on assignments of error. that the verdict was contrary to law and the evidence, and was excessive, under the influence of passion or prejudice controlling the jury.

The cause is therefore to be considered solely upon the evidence, no question being presented upon the instructions of the court or any ruling during the trial, nor upon the overruling the motion for a new trial.

The first contention of the plaintiff in error is, that the allegation that he made the representations set up by the plaintiff below was not established before the jury upon a fair preponderance of the evidence, and refers to the language of the fifth instruction of the court: "that a mere fraudulent representation is not actionable; that the plaintiff must not only show by a preponderance of evidence that the representations were made, and were false and fraudulent, but must show affirmatively by a preponderance of evidence that he has been injured thereby, and that he is in some way placed in a worse condition than he would have been had the statements been true."

It will be seen from this instruction that the court adhered to the usual course and theory of instructions to juries that they should find according to the weight and preponderance of evidence, and that it was their duty to keep that principle in view. In a court of review it is always to be presumed that the jury has observed and acted upon that principle, where evidence was submitted to sustain their finding. A court of review will hesitate to put itself in the place of the jury and reweigh the testimony. A patient reading of the voluminous record in this case, in which it is confessed that there are a few inconsistencies, shows that there is sufficient testimony to warrant the find-

ing that the defendant not only represented to the plaintiff as an inducement to trade for the mares described, that they were thoroughbred and pedigreed stock, that one was registered and that he held the evidence upon which the other was entitled to be registered, but that such representations were false and fraudulent, and that the plaintiff was injured thereby. Of the plaintiff's witnesses on the trial, several fixed the value of the mares represented as thoroughbreds not to exceed \$250, and while most of them failed to establish their value or that of similar mares regarded as thoroughbred stock and registered or entitled to be registered as such, the witness Linton did fix a valuation in his testimony "at anywhere from \$300 to \$600 apiece." Taking his lowest estimate of the value of mares such as these were represented to be, \$600 for the two, and deducting the value placed upon them as common stock, such as they were, by the other witnesses, \$250, leaves damages to the plaintiff on that account of \$350. This measure is established, not only by a considerable evidence, but by a fair preponderance of all the evidence in the case.

The plaintiff's second cause of action consists in his care and custody of a portion of the herd of cattle sold to defendant for several months beyond the time agreed upon for their delivery. This service the plaintiff testified was worth seventy-five cents per head of 107 cattle, amounting to \$80.30. While there is some conflicting testimony as to the fact of rendering the service, there is none as to the value of it, if performed. There is sufficient evidence, in my opinion, in the plaintiff's testimony and that of the corroborating witness, Sawyer, to have justified the jury in finding for the plaintiff on this cause of action.

The damages incident to the mares, and the charges on the cattle, amounting to \$430.30, the jury found for the plaintiff on account of both but \$400.

The finding, to my mind, is amply supported by the

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evidence, and the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

35	584
34	584
28	534
52	506
53	415

W. V. MORSE & Co., APPELLEES, v. CATHERINE ENGLE,
APPELLANT.

[FILED JANUARY 28, 1890.]

1. **Judgment: VACATING: UNAVOIDABLE CASUALTY.** F. J. E. and C. E. were husband and wife, living together as such with their family at their house in A. A deputy sheriff came to the house for the purpose of serving a summons in a foreclosure case, in the district court, upon C. E., the wife, and F. J. E., the husband, met him at the door; upon his asking for Mrs. E., informed him that she was in the parlor busy with company, thereupon the deputy sheriff handed to and left with F. J. E. for C. E. a proper copy of said summons and made return of the summons accordingly. F. J. E. did not deliver said copy to C. E., nor inform her thereof, but kept it or destroyed it. After final decree entered in the cause, C. E. petitioned the court to set aside the decree and grant her a new trial, and in her petition set up the said facts as unavoidable casualty or misfortune preventing her from defending the action. Upon appeal, *held*, not sufficient to entitle her to such relief under the statute.
2. **The Evidence considered, and *held*, to sustain the findings and order of the district court.**

APPEAL from the district court for Hamilton county.
Heard below before NORVAL, J.

Hainer & Kellogg, and *Phil Likes*, for appellant, contended, *inter alia*: Courts of equity, even in the absence of a statute, will vacate a judgment on account of unavoidable casualty, etc. (*Horn v. Queen*, 4 Neb., 108; *Douglas Co. v. Connell*, 15 Id., 617; *Thompson v. Sharp*, 17 Id., 71; *Drin-*

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ger v. Receiver, 8 Atl. Rep. [N. J.], 811; 2 Pomeroy, Eq. Jur., 836.) It has never been held that a judgment obtained on personal service may not be vacated, and it is a rule that the return of an officer may be impeached for fraud. (*Nieter v. Trentman*, 4 N. E. Rep. [Ind.], 306; *Newcomb v. Dewey*, 27 Ia., 381; *Bond v. Wilson*, 8 Kan., 228; *Freeman*, Judgments, sec. 109.)

Charles B. Keller, and Agee & Stevenson, contra.

COBB, CH. J.

This appeal comes to this court from the judgment of the district court of Hamilton county, upon the petition of Catherine Engle to vacate and set aside the judgment and decree of said court theretofore rendered in a cause wherein W. V. Morse & Co. were plaintiffs and said Catherine Engle, F. J. Engle, and John Raben were defendants, and for a new trial in the said cause. For ground of such application she sets forth in her said petition substantially that the said F. J. Engle and petitioner were, and for more than twenty-one years last past had been, husband and wife, and with their children constituted one family; that on the 7th day of February, 1885, the said petitioner was, and for a long time prior thereto had been and continued to be, the owner in her own right, in fee simple, of lots 7, and 8 in block 21, in the original town of Aurora, and being the same property described in the pleadings and decree in said cause; and during the whole of said time actually used and occupied the same and the whole thereof with her said family as a homestead; that said property is of the value of less than \$2,000, and at no time has been worth to exceed that sum; that on the 7th day of July, 1885, the said John Raben was justly indebted to the plaintiff W. V. Morse & Co. in the sum of \$1,400 and that said petitioner was in no way bound for the payment of said debt, nor interested in the payment thereof,

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nor had she any knowledge of said debt, and the said Raben being pressed for the payment of said debt, and being threatened with suit thereon, for the purpose of avoiding such suit, and designing and intending wickedly and corruptly to cheat, wrong, and defraud said petitioner, obtained her signature to the note and mortgage declared on by the plaintiffs in this cause by fraud, deceit, and false representations, in this, to-wit: The said John Raben prevailed upon and induced the said F. J. Engle, husband of petitioner, to present, and he did present, said note and mortgage to said petitioner and obtain her signature thereto by concealing from her the true nature and import of said papers, and each of them, and falsely stating to her that a defect had been found in her title to said lots and that it was necessary for her to sign said papers to correct her said title and to save her home, and, without allowing her to examine said papers, assured her they were all right and as represented, and peremptorily commanded her, in great haste and austerity of temper, to sign said papers; that said petitioner was by said statements and conduct of her husband so greatly frightened as to be unable to examine or understand said note and mortgage, or their import, even had she then the opportunity to examine them, and believing said statements made to her by her said husband to be true, and relying thereon and desiring to save her home, and in good faith believing her signature of said papers to be a proper and necessary act to correct a mistake in her title, and believing it to be her absolute duty to obey her husband, and fearing to disobey him, she was constrained to and did, without any consideration, sign said note and mortgage, and the same were then immediately taken away and handed to said Raben.

The said petitioner further averred that she did not at any time appear before W. F. Peck, the notary public before whom said mortgage purports to have been acknowledged, nor before any other officer or person, and

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acknowledge the same to be her voluntary act and deed, nor did she ever at any time even speak to said W. F. Peck, nor did he to her, except simply to be introduced to him, nor did she ever acknowledge said mortgage, or the execution thereof, to be her voluntary act and deed, or ever authorize any one to execute said certificate of acknowledgment attached, and the same was written and made and is wholly without authority and is false and untrue.

The petitioner further averred that the mortgage, as declared upon in said action, purports to have been signed by her in the presence of one O. E. Peck, whose signature is appended to said mortgage as an attesting witness, but she averred that said attestation was wholly false and fraudulent and that said O. E. Peck was not present when she signed said mortgage as aforesaid, nor did she ever in any manner recognize said signature to be her own in the presence of said O. E. Peck, nor refer in any way to the same in his presence; nor did she ever sign said mortgage in the presence of any witness who subscribed the same as a witness thereto.

Petitioner further alleged and charged the truth to be that in the whole of said transaction the said F. J. Engle and W. F. Peck acted under the express direction of the said John Raben, and in all respects carried out his said corrupt plans, and that she had no knowledge, information, or notice whatever that said papers so signed by her as aforesaid were a note and mortgage, or that any fraud or deception had been practiced upon her until long after said mortgage had been placed upon record, to-wit, in the fall of the year 1886, and that after she obtained such notice and knowledge and proposed to take the necessary steps to protect her rights in the premises, she was prevented by her said husband from doing so for a long time and until he left said county and went to the state of Colorado, about the 15th day of January, 1887.

Petitioner therefore, under the advice of counsel, as she

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alleges, denied that she ever made, executed, or delivered either the note or mortgage declared on by the plaintiff in their action and she submitted to the court that said note and mortgage are null and void as to her; that after she signed the said note and mortgage as aforesaid, the said W. F. Peck appended his said unauthorized certificate of acknowledgment to said mortgage and the said O. E. Peck appended his untrue and unauthorized attestation as a subscribing witness to said mortgage, the said John Raben, who was then and there acting for and as the agent of said W. V. Morse & Co., as well then as in the whole of said transaction, and in all that he did in and about the same, in pursuance of his corrupt plan to cheat, wrong, and defraud petitioner, and by false representations to obtain from her the said mortgage, and receive credit therefor on his said debt, indorsed said note and delivered said note and mortgage to said W. V. Morse & Co., who caused the same to be duly recorded in the office of the county clerk of said county, and the said W. V. Morse & Co. thereafter brought their action in said court to foreclose said mortgage and prosecuted the same to a decree; that the summons issued, served, and returned in said cause purports, by the return thereon, to have been served upon said Catherine Engle by leaving a true and certified copy thereof at her usual place of residence, but petitioner averred the truth to be that said summons was in fact served by leaving such copy at said residence in the hands of her said husband, who retained the same and concealed it from her, and the same did not come into her hands or to her notice; that she had no knowledge, information, or notice whatever of the pendency of said action, suit, or of any suit to which she was a party until long after the decree had been entered in said cause and a request for a stay filed thereon. She further alleged that her said husband employed counsel to defend said action and which counsel in said cause, at the instance and under the direction of her

said husband, appeared therein for her as well as for him, but she averred that said appearance of counsel for her as aforesaid was without her consent or authority; that said counsel had neither knowledge or notice of her said defense nor the facts stated in her said petition touching the manner of obtaining her signature to said note and mortgage, nor did said counsel interpose any defense whatever to the merits of said cause; that the acts of said counsel in said cause, so far as the same affect said petitioner, are null and void, and should be held for naught. She referred specially to each and every paper filed or of record in said cause and asked that the same might be severally made a part of her said petition as though spread at large therein, and prayed that said judgment and decree might be set aside and vacated and said cause set down for a new trial, etc. Thereupon the plaintiffs and John Raben, defendant, presented and filed a motion to dismiss the petition of the defendant Catherine Engle filed therein for the reason that said petition and the record in said cause show that actual service of summons was had in said cause, and for the further reason that said petition states no ground or fact which would authorize the court to vacate said decree or grant a new trial.

This motion does not appear to have been acted upon by the court.

The plaintiffs demurred to said petition, which demurrer was overruled. Thereupon the plaintiffs and said defendant John Raben answered to said petition. In and by their said answer they denied each and every allegation in said petition contained and not therein expressly admitted. They further answered and alleged that said note and mortgage were duly executed in the presence of one W. F. Peck, and the execution of said mortgage was duly acknowledged by said Catherine Engle to be her voluntary act and deed, before said W. F. Peck, deputy clerk of the district court of Hamilton county; that said Catherine Engle, long after

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the execution of said note and mortgage to the plaintiffs, recognized and admitted the validity of the same; that long after the execution and delivery of said note and mortgage the said Catherine Engle, then being the holder in her own name of a policy of insurance against loss by fire on the dwelling house situated on said lots, for the purpose of further securing the payment of said note, duly assigned and delivered said policy of insurance to the plaintiffs, and any loss under said policy was, by direction of said Catherine Engle, made payable to the plaintiffs, who are the holders of the same; that said Catherine Engle was not in fact the owner of said premises, but held the naked legal title thereto without any equitable right, and in trust for the said F. J. Engle, and the creditors of the said F. J. Engle and John Raben, who were then, and for a long time had been, partners doing business in Aurora under the firm name of Engle & Co.; that about one year prior to the execution and delivery of said note and mortgage said Raben and said F. J. Engle commenced in Aurora in general business under the firm name of Engle & Co.; that prior to entering upon said premises said F. J. Engle had bought and paid for the lots described in the petition from the defendant Raben, paying for the same wholly out of his own funds, and that after the commencement of said copartnership business the buildings on said lots were erected and paid for out of the money of said copartnership, and that no portion of said buildings, or any other improvements thereon, were ever paid for by said Catherine Engle, but the whole was paid for out of the funds of said copartnership, and out of the proceeds of the sale of goods sold to said firm by the plaintiffs and other creditors of Engle & Co., and that at the time of the execution and delivery of said note and mortgage the said F. J. Engle, in addition to the amount drawn out of the funds of said copartnership for the erection of buildings on said lots and otherwise improving the same, had drawn out large sums of money which had

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been applied by him and his wife Catherine to the support of themselves and their family; and defendant Raben answering alleged and submitted that said F. J. Engle & Co. had an equitable interest in said premises to the full extent of improvements thereon, which said improvements he and plaintiffs alleged were of the value of \$1,500.

Plaintiffs answering for themselves alleged and said that Catherine Engle never notified or claimed to them that she had not executed and delivered said note and mortgage with full knowledge of the nature and character of the same; that at the time of the execution and delivery of said note and mortgage there was due to said plaintiffs from said Engle & Co. a large sum of money, to-wit, the sum of more than \$1,400; that by the execution and delivery of said note and mortgage said plaintiffs were induced to extend the time for the payment of \$1,500 of the amount due them from said 7th day of February, 1885, to the 1st day of November, 1885, and induced to rely upon said mortgage as security for said amount and were thereby prevented from collecting the amount of their claim from Engle & Co., who were then solvent, and who were then the owners of a large stock of merchandise unincumbered, of the value of \$10,000; that on the — day —, 1886, the said plaintiffs filed their petition in the district court of Hamilton county for the foreclosure of said mortgage and caused a summons to be duly issued and actual service was made thereof upon said defendant Catherine Engle in said Hamilton county requiring her to appear and answer said petition in said court as required by law; that such proceedings were afterwards had that on the — day of —, 188—, said plaintiffs obtained a decree foreclosing said mortgage; that notwithstanding the foregoing facts, and well knowing that counsel had appeared for her in said cause and had filed a written request for a stay of the order of sale in said cause, and intending to avail herself of the benefit of the action of said counsel, and concealed from the plaintiffs'

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attorneys, A. W. Agee and W. J. Stevenson, any claim or pretense that said note and mortgage had not been executed by her with full knowledge of the contents and nature of the same, and without any pretense that said decree had been obtained without her knowledge, or that counsel who appeared in said cause on her behalf acted without authority from her, and that the first knowledge which the plaintiffs or their said attorneys had that said Catherine Engle denied the free voluntary execution of said note and mortgage, or either of them, or that the appearance of counsel for her was unauthorized, was obtained by reading the petition filed herein; that during all the time since the said 7th day of February, 1885, said Catherine Engle has resided in the same city, to-wit, the city of Aurora, Hamilton county, in which the said Agee and Stevenson have resided and within less than 200 yards of their office; that since the execution and delivery of said note and mortgage, and before the time of the filing of the petition of said Catherine Engle, the said Engle & Co. had become insolvent and are still insolvent and wholly unable to pay their indebtedness, and that the only way plaintiffs have of collecting their said claim for which said note and mortgage were given is by the sale of said property under said decree, and they submitted to the court that said Catherine Engle had ratified the action of counsel in appearing in said cause and on her behalf, and that she is estopped from denying the due execution and delivery of said note and mortgage, or the validity of the proceedings and judgment in said cause.

The plaintiffs denied that the said Raben and F. J. Engle ever acted as agents for them, or with their knowledge or consent made any representations to either said Catherine Engle or her husband, F. J. Engle, and alleged that they received said note and mortgage in good faith, fully believing that the same had been duly executed, witnessed, acknowledged, and delivered by said Catherine Engle and F. J. Engle as to said defendants.

The reply of the said Catherine Engle admitted the signing of her name upon the back of the policy of insurance, named in the answer of plaintiffs, but alleged that she was induced to sign the same by the misrepresentations, fraud, and deceit of her husband, the particulars of which she set out at length; that she signed the same without intent to thereby convey or assign any interest in her said property, and denied that she thereby ratified the said note or mortgage.

There was a hearing and trial to the court, which found the issues joined therein for the plaintiffs, W. V. Morse & Co.; that the said defendant Catherine Engle was not entitled to have vacated and set aside the decree theretofore rendered in said cause in favor of the plaintiffs, and against the defendants; that said Catherine Engle, defendant, was not entitled to a new trial therein, as prayed for in her petition.

The petition of the said Catherine Engle was thereupon overruled and dismissed, a new trial denied, and the decree in said cause affirmed and approved, etc.

The defendant petitioner brings the cause to this court by appeal.

This proceeding was, doubtless, intended to be brought under the provisions of section 602 of the Civil Code, yet I doubt that any of the nine subdivisions of that section is applicable to its facts. I copy the section:

"A district court shall have power to vacate or modify its own judgments or orders after the term at which such judgment or order was made: First—By granting a new trial of the cause within the time and in the manner prescribed in section three hundred and eighteen. Second—By a new trial granted in proceedings against defendants constructively summoned, as provided in section seventy-seven. Third—For mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order. Fourth—For fraud practiced by the successful party in

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obtaining the judgment or order. Fifth—For erroneous proceedings against an infant, married woman, or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings. Sixth—For the death of one of the parties before the judgment in the action. Seventh—For unavoidable casualty or misfortune preventing the party from prosecuting or defending. Eighth—For errors in a judgment shown by an infant in twelve months after arriving at full age, as prescribed in section four hundred and forty-two. Ninth—For taking judgments upon warrants of attorney for more than was due to the plaintiff, when the defendant was not summoned, or otherwise legally informed of the time and place of taking such judgment.”

The clause of the above section which is cited by defendant petitioner in the brief of counsel is the seventh—“Unavoidable casualty or misfortune preventing the party from prosecuting or defending.” The unavoidable casualty or misfortune which it is claimed prevented the party from defending, is the fact that when the summons in the action was served on her by the deputy sheriff, by leaving a copy thereof at her place of residence, her husband, F. J. Engle, kept it, and purposely withheld it from her, so that she had no actual notice or knowledge of it. The return of the officer indorsed upon the summons, as returned and in the record, shows personal service upon the said defendant by leaving a copy thereof at her place of residence, in the proper county, and Mr. Whiteside, deputy sheriff, who was sworn as a witness, testified to the making of such service, and F. J. Engle, who was also sworn as a witness for defendant, at the hearing testified that Mr. Whiteside came to him at the flour store and served the summons on him; that he told him (Whiteside) that he would take the other copy up to his (witness's) wife; he replied, no, that he must serve it in person, and left; that he came up in the evening and came to the door just as witness was in at supper;

witness went to the door; witness continued: "He asked for my wife; I told him she was in the sitting room, engaged with company, and he handed me the summons, and I put it in my pocket." He also stated that he did not give it to his wife, nor did he say anything to her about it, nor did he know that she ever saw it. He further stated that he did not know what finally became of said copy of summons, but suggests that he might have burned it with a lot of similar papers which he burned some five or six weeks afterwards, when about starting to Colorado. It is not suggested that F. J. Engle was prevented, by casualty or misfortune, from delivering this copy to his wife, or informing her of its nature and contents, but on the contrary it is apparent that he put himself in the way of getting possession of it, for the purpose and with the design of keeping it, and the knowledge of it away from her; nevertheless, the service of the summons upon Catherine Engle was complete and legal personal service, within the meaning of the statute.

Had the defendant been prevented from receiving the copy by any act or procurement of the plaintiffs, then, although the service would have been complete under the statute, it would have come within the fourth clause of the section above copied, "fraud practiced by the successful party in obtaining the judgment or order," and would doubtless entitle the defendant to the remedy. But there is no fact proven even tending to connect the plaintiffs with any fraud or deception in the case.

The service of the summons having been made on the petitioning defendant in strict accordance with section 69 of the Code, nothing connected with or incident growing out of such service can be held to be an unavoidable casualty or misfortune preventing the party from defending, within the meaning of the seventh clause of the section.

It is scarcely deemed possible that the petitioning defendant sought to bring her application under the provisions of

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3. The Evidence examined and considered, and held, to sustain the verdict.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

Harwood, Ames & Kelly, for plaintiffs in error, cited: *Randall v. B. & O. R. Co.*, 109 U. S., 478; *Armour v. Hahn*, 111 Id., 313; *Buckley v. Gould, etc., Mining Co.*, 14 Fed. Rep., 833; *Kelley v. Norcross*, 121 Mass., 508; *Mosely v. Chamberlain*, 18 Wis., 700*; *Deering on Negligence*, sec. 205.

C. M. Parker, and *John P. Maule*, contra, cited: *Fones v. Phillips*, 39 Ark., 17; *Mitchell v. Robinson*, 80 Ind., 281; *Corcoran v. Holbrook*, 59 N. Y., 517; *Crispin v. Babbit*, 81 Id., 516; *Green v. Banta*, 48 N. Y. Super. Ct., 156; *Deering on Negligence*, secs. 204, 205; *Wood, Master and Servant*, sec. 438.

COBB, CH. J.

This is a proceeding in error from the district court of Lancaster county.

In the court below the plaintiff complained that the defendants were contractors and builders, in the city of Lincoln, Nebraska; that on the 28th day of August, 1886, the defendants were engaged in the erection of a two-story brick building on O street, in said city; that the walls of said building had reached a height of thirty-five feet above the ground, and about five feet above the second story; that the plaintiff was a brick mason, or bricklayer, and was employed by the defendants, with other bricklayers, for hire, to lay brick on said building, above described.

Second—It was the duty of the said defendants to oversee the work, and they had undertaken the general supervision thereof; that among other things they would

and did direct and prepare the scaffold, and see that the bricklayers were supplied with mortar and materials, and they would direct the bricklayers upon what scaffold to work.

That while the plaintiff was working upon the east side of said building, the defendants prepared and erected a scaffold at the northwest corner of said building, thirty-five feet above the ground, and had placed brick and mortar thereon, and then directed and ordered the plaintiff to go upon the same, to lay brick; that the plaintiff obeyed said order, and went upon said scaffold, and commenced laying brick, as directed.

The plaintiff further alleges that the defendants so negligently and carelessly erected, constructed, and prepared said scaffold that it was insufficient to sustain and bear the weight which the defendants placed thereon, consisting of brick and mortar, and placed there by and under the direction of the defendants, all of which it was the duty of said defendants to know, and which they could and might have known by the exercise of ordinary care, prudence, and caution.

That while the plaintiff was on said scaffold, engaged in laying brick under the order and direction of said defendants, said scaffold, by reason of the weak, insufficient, and careless manner in which it was constructed, as above alleged, broke, gave way, and fell, and precipitated the plaintiff to the ground, a distance of thirty-five feet; that as a result of said falling of said scaffold, and this plaintiff falling with the same, his right arm was broken, crushed, bruised, and mangled in such a manner that the same had to be and was amputated above the elbow.

The plaintiff further alleges, that by reason of said fall above described his right leg was badly fractured, sprained, and bruised, which has ever since caused him great pain, trouble, and expense, and as a result thereof said leg is permanently disabled.

Plaintiff further alleges that by reason of his said injuries, as above described, he is forever unable and unfit to follow and labor at his said trade; that he could and did earn thereat the sum of four dollars and fifty cents (\$4.50) per day; that at the time of the said accident he was thirty-six years of age, and that his ability to earn a living at laboring at his trade or any other manual labor for the remainder of his life is very much impaired, if not totally destroyed.

Plaintiff further alleges, that by reason of said injuries so received he was confined to his bed for the period of four weeks, and that he experienced great physical as well as mental suffering.

That by reason of said injuries, above described, he has been damaged to the amount of \$10,000; that he was damaged by loss of time, so lost while confined to his bed, \$108; expenses nursing, medical treatment, etc., \$100; wherefore plaintiff demands judgment against said defendants for the sum of \$10,208, his damages, and for costs of suit.

To this petition the defendants answered as follows:

The defendants, for answer to the plaintiff's petition, heretofore filed herein, admit the allegations made in the first paragraph of said petition, but deny that it was the duty of the said defendants to oversee the work mentioned in said petition, or that they had undertaken the general supervision thereof, but deny that, among other things, they erected and prepared the scaffold upon which the bricklayers employed upon said building worked, and supplied them with mortar and material therefor, and aver that the said plaintiff, and other bricklayers and co-employees with plaintiff, prepared and erected said scaffold, and also a scaffold at the northwest corner of said building, and placed brick and mortar thereon, and admit that plaintiff went upon said scaffold for the purpose of laying brick, under the defendants' employment. And these defendants deny

each and every allegation in said petition contained, except as hereinbefore expressly admitted, and aver that if said last mentioned scaffold was carelessly or negligently built, or made, it was the fault of said plaintiff and his said co-employees, and not of these defendants, and that the same was not constructed pursuant to any order or direction given by these defendants on their behalf, and, if negligently and unskillfully constructed, these defendants were ignorant thereof, and aver that it was the duty of the plaintiff to see that the scaffold was carefully and skillfully constructed, and of sufficient strength to support the persons and materials to be placed thereon, and that the same was not too heavily loaded, and that, if by any fault or negligence in any of these respects said scaffold gave way or fell, it was the fault or negligence of plaintiff, and not of these defendants, or either of them.

And these defendants, further answering, say that the said plaintiff's said supposed injury complained of in said petition, if any occurred, was not caused by and did not result from any wrong, fault, or negligence on the part of these defendants, or either of them, or of any person or persons in their employment, unless as above stated, but was caused by the wrongful, careless, and negligent conduct of the said plaintiff in leaping from said platform over the outer wall of said building, and consequently falling upon the ground, a distance of about twenty or thirty feet.

And these defendants further aver, that if the plaintiff had exercised ordinary care and prudence, no harm or injury would have resulted to him from the giving way and falling of the scaffold upon which he was at work as aforesaid, but that the said injury, if any occurred, was the result of the plaintiff's own careless, negligent, and improper conduct, as aforesaid.

Wherefore, the defendants pray to be dismissed hence, with their costs.

There was a trial to a jury with verdict for the plaintiff.

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iff, in the court below, for \$625. The defendants' motion for a new trial having been overruled, judgment was entered on the verdict, and the defendants bring the cause to this court on the following assignment of errors:

1. That the verdict is not sustained by sufficient evidence.
2. It is contrary to law and the evidence before the jury.
3. It is contrary to the law and the evidence, and should have been for the defendants.
4. It is contrary to the instructions of the court; No. 4 of its own motion, and of No. 8 asked by the defendants.
5. Error in giving instructions Nos. 2, 3, and 5 of its own motion.
6. In refusing to give Nos. 3, 5, and 6 asked by defendants.

The facts in this case, as they appear from the record, are, substantially, that the plaintiffs in error were, in August, 1886, contractors for the erection of a building on O street in this city. The defendant in error was a bricklayer, who, with several other bricklayers and laborers, was employed by the day by the contractors in the erection of the walls of the building. On the 28th of August, the walls of the first and second stories being completed, the workmen and the defendant in error were engaged in laying the walls of the third story, and were at a height of thirty-five feet above ground, and five above the second story joist. While the defendant was upon the scaffold, the beam-brace, or pudlock, as it is technically termed by witnesses, upon which the reverse end of the scaffold or platform rested, gave way, and by the weight of brick, mortar, and a workman thereon, fell downward, and forming a fulcrum of the beam at the center of the scaffolding, threw up the end suddenly on which the defendant was standing, precipitating him over the wall, and to the ground, breaking an arm, which was subsequently amputated, and permanently injuring a foot, and causing other permanent

injuries. A description of the scaffolding from the plaintiff in error's brief is believed to be substantially correct, as follows :

The testimony disclosed that the scaffold upon which the accident occurred was built along the side of the building, beginning at one end thereof, and was constructed in this manner :

The planks used to cover the platform, and upon which the brick and mortar were placed, and which served as standing room for the men, were fourteen to sixteen inches wide and from twenty-two to twenty-four feet in length. These were supported by what are called by the witnesses "jacks and pudlocks." The jacks are constructed by affixing two 2x4 or 2x6 studding upon a cross piece with braces, to serve as a pedestal, the studding being parallel with each other and a few inches apart, and perforated with holes through which iron pins are thrust for the support of the pudlocks. In the construction of the scaffold these jacks are placed at a distance of four and one-half to six feet from the brick wall, and pieces of 2x6 studding are placed between the upright studding of the jack, so that one end rests upon the iron pin and the other is supported by the wall of the building ; these pieces are called "pudlocks." This arrangement is made at intervals along the wall, and then the planks constituting the platform are placed along parallel with the wall and across and resting upon the pudlocks. Each length of planks constituting the platform is called a "bent." The testimony is that the defendant in error was working on the north end of the north bent of this platform along the west side of the building, which at that time consisted of two bents, when the support at the south end of this bent, being in the middle of the entire platform, gave way, the south end of the planks, upon which he was standing, falling violently down under the weight of the material placed upon it, and throwing him over the wall, causing the injury complained of.

I will observe that the scaffolding here described is entirely that of the west side of the building, composed of two or more lengths of plank; but we have to deal only with the the northern lengths of the planks.

Upon most or all of the following facts there is a conflict of testimony. It is the theory of the plaintiff below that the fall of the scaffold and resultant injury were caused by the defective construction or material of the scaffold, or both. The defendants below invoke the doctrine expressed in the phrase "fellow-servants or co-employees," and contend that if there was a defect in the material, or the construction, of the scaffolding, it was caused by the negligence of the fellow-servants of the plaintiff, of which he took the risk when he engaged and continued in the employment of defendants.

The plaintiff testified on the trial that he had been engaged at masonry and bricklaying for twenty years and understood the rules and customs of the trade; that it was not the usual custom for bricklayers to have anything to do with the erection of the scaffolding, though he had, on some occasions, departed from that custom and assisted in the erection; that it was the nearly universal custom for the scaffold to be put up by laborers, under the supervision of the foreman of the work, or of the contractor, where no other foreman had charge. He testified that this scaffold which broke down was erected while he was at work on the east wall with his back towards the scaffold; that on the day of the casualty, about 1 P. M., he was directed by one of the contractors to go to work upon that scaffold and "start his lead," which he did.

He had on a previous cross-examination given a description of the usual manner of constructing scaffolds, but as it consisted largely of questions put by counsel, illustrated by books on a table, it is, without diagrams of the illustrations, hardly useful or intelligible. But from it all I make out that this scaffolding rested upon pudlocks,

most of which were 2x6 [inches], but one of which was 2x4, and that he observed this discrepancy upon going upon the platform, and that he said nothing about it.

It was the opinion of all the witnesses, and seems conceded, that a pudlock of sound lumber, free of knots, two by six inches, is safe, and sufficient for scaffolding of the kind; but it may be stated as the opinion of the witnesses that one only *two by four* is, *prima facie*, unsafe for its uses.

The witness further testified that up to the time of his injury Henry Stevens, one of the contractors, had the general management and supervision of the work; that no other foremen was employed; that it was their custom to look after their own work; that this scaffold was, to the best of his knowledge, put up by two laborers employed by defendants, Frank Cathers and Hiram White, and that defendants were there superintending its construction; that he could not say that he saw them do any work with their hands more than that of instructing the men, but they were there superintending the construction of the scaffold. In reply to the question, "You may state if you knew the scaffold was defective when you went upon it," under objections and exception he answered that he did not know that it was not sufficient to hold him or he should not have gone on it.

John G. Wright, a witness for plaintiff, testified that he had been engaged in laying brick since the year 1854; that on the day of the accident to plaintiff he was working on the walls of the building; that he saw the scaffold before the plaintiff went on it, and had gone down off the scaffold for a purpose and was returning when he saw a point under the joint of the planks of the scaffold which looked to be weak; that he spoke to a workman, telling him that he had better put in another pudlock before any one goes on there; that Edward Stevens was directing them in putting up more scaffolding, and that Henry Stevens had the supervision of the brick work, but that this Saturday he thought Ned

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was the man there. The witness also described the manner in which the scaffold was built, but as he seems to have exemplified his description largely by gesticulations it is not practicable to quote it. He testified, however, "that Mr. Stevens was building them."

To the question, "What was the size of the pudlocks?" he answered, "I think two by six, except one under the joint, two by four"—that he would not swear it was two by four, but his recollection was that, for the reason that he had called attention to it. This was a little while before plaintiff went upon it. That he was not looking at the scaffold when it fell, but was facing the opposite way. To the question, "State the appearance after you heard and observed the crash," he answered, "first I saw the plank going up. I judged from the appearance of Howe that he had turned round to take a trowel of mortar from the board and was passing to the north toward his work, and my recollection is that at the time he went over, the plank he had his foot on went up and turned him over towards the wall."

Q. Was anybody else on the scaffold?

A. Haass was near the point where the pudlock was.

Q. Did you see Howe fall?

A. I saw him go over the wall.

The remainder of the witness's testimony in chief was directed to the defendant in error's condition after his injury. On cross-examination he testified:

Q. Which one of the Stevens brothers was present that day.

A. Ned. * * *

Q. Was the scaffold constructed to appear in a workmanlike manner?

A. There was nothing wrong with the scaffold that I know of except that weak point, weak pudlock.

Q. At that time had the scaffold been loaded with material, when you saw this weak point?

A. Yes. *

Q. What was the weakness; what trouble was there?

A. The pudlock there was two by four inches.

Q. Was there any great quantity of material piled up there which indicated that it was bad?

A. The scaffold was considerably well loaded with brick and mortar boards—with brick at least.

Q. If the pudlock had been two by six inches it would have been safe?

A. Yes, if it was a good sound two by six.

Hiram White, a witness for plaintiff, testified that he was employed by defendants in August, 1886, and had been wheeling brick on the day in question, "that they got in a hurry, the bricklayers having caught up with them; they commenced rushing business, and he was sent to help Frank Cathers put up the scaffold."

Q. Who sent you?

A. One of the Stevens. I had it in my mind that it was Harry, but don't know positively whether it was or not.

Q. What did he say to you?

A. To go and help Frank get the scaffold up; and I got.

Q. What did you do?

A. Helped to put the pudlocks in, and to put the boards on. We had substantially put in the pudlocks, and did not have enough to make them solid, and they were set up one at each end of the planks, and we put something on the two by fours to make them center.

Q. Who told you to do this?

A. Stevens.

Q. Was he there?

A. Right around the scaffold we were putting up, all the time.

Q. What did he say?

A. He told us to rush.

Q. What did you say to him about the scaffold being defective?

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A. I don't know ; after we got the center piece put in, and the two by sixes in the wall, the two by four was standing up, and we put an inch piece on the inside and nailed it on the center, on the inside of this standing up piece. I told him, and have forgotten the man who was putting mortar on there, I told him that was a pretty frail looking thing anyway to put that stuff up ; he told me to hurry off there, and get the other up. We had two lengths up and were starting the third. I was standing on the second bent when it broke off, this thing nailed on busted off. Howe was standing on the end of the plank on the corner, and it threw him up about two feet, he went up and came down outside the wall. I saw him going, saw his hands out. I was on the incline going down, and jumped back on the other bent, not very far, for I was standing right on the end of the plank.

Q. Tell what the planks did on which Howe was standing.

A. The end towards me went down as the other end went up, and Howe went up, and went down on the other side.

Q. Which one of the defendants was it, if you know?

A. I thought it was Harry, but am not positive whether it was him or Ed. He had been there, as he had been bossing the job all along.

Q. Harry was there?

A. Yes, sir ; I thought that was Harry. I was pretty sure when I came up here that Harry was the man, but I won't say whether he was or not—am not positive which one it was, but it was one or the other.

Q. Who had the supervision and control of the job?

A. Harry started it, I am pretty sure ; he was there most, I think.

Q. Were they doing the bossing there?

A. They were ; they bossed me anyway. I don't know whether Ed was bossing then, or not.

The most of the foregoing testimony tending to prove that the cause of the injury was an insufficient pudlock in the erection of the scaffolding was contradicted by that of the plaintiffs in error, and of Frank Cathers on their behalf. It may be observed, however, that their testimony suggests no other cause for the falling of the scaffold, or the injury to the defendant in error.

The evidence as to the superintendence and supervision of the work by the plaintiffs in error, or either of them, or the erection of the scaffolding which gave way, is somewhat conflicting, and in doubt; yet upon a view of all the testimony it was competent for the jury to find that the scaffold was erected under the immediate direction and orders of the plaintiffs in error, or one of them.

The plaintiffs in error complain of the refusal of the court below to give the third, fifth, and sixth instructions requested, as follows :

“III. That the plaintiff, in undertaking the labor and service in which he was engaged at the time of the accident, as a part of his employment took upon himself the risks ordinarily incident to such employment and assumed for himself any accident which results from the negligence on the part of other persons employed like himself in the same kind of service. If you shall therefore find that the injury was incurred by or through the negligence of a fellow-workman employed in the like service with him, then he cannot recover. (Refused, and excepted to by defendants.)

“V. That when several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the other, and can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the

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whole party may require. If you shall find from the evidence that the plaintiff had the same opportunity as any other workman, or the defendants, to judge of the proper construction of the scaffolding or of the material used, and, notwithstanding this fact, that he still went upon the scaffolding and is injured, the injury in such case is one which the injured must bear himself. (Refused, and excepted to.)

"VI. That if the injury in such case was such an injury for which the law does not provide a remedy against the defendants, you are instructed to return a verdict for the defendants. (Refused, and excepted to.)"

The following instructions appear to have been given by the court of its own motion :

"I. That in August, 1886, the defendants were contractors erecting a building on O street, and the plaintiff was a brick mason employed by defendants on the building; that while the plaintiff was at work the defendants had built a scaffold upon the west wall and ordered the plaintiff to go to work thereon; that defendant carelessly erected, constructed and prepared said scaffold, and that it was insufficient for the purpose for which it was built, which defendants could and might have known by the exercise of ordinary care and prudence; that while plaintiff was laboring upon said scaffold, the scaffold broke and the plaintiff was thrown over the wall and injured by the breaking of his arm and leg; that by reason thereof, by loss of time, incapacity to labor, expenses incurred and pain endured, plaintiff has been damaged in the sum of \$14,208."

The defendants in their answer admit being contractors, engaged in the construction of a building and of employing the plaintiff. Defendants deny that they built the scaffold, but allege that the plaintiff and other co-employees built said scaffold, and if the same was carelessly and negligently built, it was the fault of the plaintiff and their co-employees and not the defendants, and the same was not constructed under any direction of the defendants, and if so

built, defendants were ignorant of the fact; that plaintiff, by the exercise of ordinary care and prudence, could have avoided any injury, and that the injury was the result of the plaintiff's own careless, negligent, and improper conduct; and defendants deny each and every allegation of the petition, except as above admitted.

The reply to the answer is a general denial.

"II. The burden of the proof is upon the plaintiff, of every material allegation of his petition by a preponderance of the evidence. The gist of this action is the alleged negligence of the defendants in the construction of the scaffold, and upon your finding upon the question of negligence this case will depend.

"III. If you find from the evidence that the defendants, or either of them, constructed the scaffold, or knew of the manner in which it was constructed, and you further find that the scaffold was constructed in a careless and negligent manner, so as to render the same unsafe by reason of the carelessness of construction, or apparent weakness of the material employed, and that the plaintiff was not guilty of negligence on his part, your verdict should be for the plaintiff.

"IV. If you find from the evidence that the defendants, nor either of them, constructed, nor aided in the construction of the scaffold, nor knew of the manner in which it was constructed before the injury, but that the scaffold was constructed by some co-employees of the plaintiff, and that the defendants employed competent men, who built the scaffold and furnished proper and safe material for the same, then the plaintiff cannot recover and your verdict should be for the defendants.

"V. If you find for the plaintiff, you should allow such compensation as to you, under the evidence, shall seem proper for the loss of arm and other injuries proven, if any, taking into account the decrease in plaintiff's ability to earn money, his loss of time, his expenses incurred by reason of

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the injury, his pain and suffering, his expectancy of life, and allow such sum as would compensate the plaintiff for the injury, but you should not allow vindictive or punitive damages. If on the other hand you find for the defendants, your verdict should be simply a general finding for the defendants."

The following were given on the motion of defendants :

"I. The jury are instructed that the plaintiff must recover, if at all, upon proof which by preponderance of the evidence satisfies them that the allegations of the petition are true as to the manner in which he received his injury. The charge is that of negligence against the defendants. It is not enough for the plaintiff to show that he has sustained an injury, but must show in addition that the injury resulted by and through the negligence of the defendants in and about the erection and construction of the scaffolding, and that he himself had not done any act not to be done, nor omitted any which should have been performed which contributed in any way to the happening of the accident.

"II. The fact that plaintiff is injured is only one of a series of facts to be established by a preponderance of the proof. The petition charges the defendants with negligence. In determining whether or not the defendants have been guilty of negligence, you are to consider the business in which they were at the time engaged, and that of the plaintiff, and the circumstances under which the parties at the time were acting. If you shall believe from the evidence that the defendants were contractors and builders, who had charge of the erection of the building at the time and place mentioned in the petition, and that the plaintiff was one of the bricklayers and builders engaged by them and in their service, and if you shall further believe from the evidence that the plaintiff was at the time a man skilled in his business and of many years' experience, and familiar with the ordinary methods of constructing and working upon and about scaffolding, and if you shall

further find from the evidence that at that time the defendants had employed one Frank Cathers to build and construct the scaffolding for the use of the bricklayers and masons at work upon the building, and that said scaffold builder was a competent person, and had been engaged as such in company with the plaintiff and the other workmen upon the building, then in such case the scaffold builder was a fellow-workman of the plaintiff within the meaning of the law, for whose neglect in the line of his duty defendants would not be liable to plaintiff, unless you believe from the evidence that the defendants themselves had directed such scaffold builder to perform the act from which the injury had resulted, and had directed the plaintiff to go upon the scaffold with notice to them of such defect therein, unless you further believe that the materials furnished by the defendants were not reasonably safe, or unless the defendants then knew that the materials by them so furnished for such use were insufficient and unsafe.

"IV. That the defendants were bound to use ordinary care in providing suitable materials and proper persons to perform the work in which the plaintiff was at that time engaged; and if you shall believe from the evidence that the defendants had provided reasonably safe and suitable material for the building of scaffolding, and a reasonably prudent and competent person to construct such scaffolding, then the defendants would not be liable if through neglect or oversight of the scaffold builder such scaffold was in fact insufficiently constructed; but you will examine the evidence with reference to whether the fault in the scaffolding was one growing out of insufficient material or insufficient workmanship. If you shall find from the evidence that the injury resulted from the breaking of one of the pudlocks, then you will ascertain from the evidence whether or not the pudlock in question was one such as was usually and ordinarily used in and about such work,

and if it was, the defendants would not be liable because of its breakage, unless they had notice and knowledge of some defect therein. If it was apparently of good material and of the usual kind used in such work, then they are not liable, although through some unknown reason the same might have broken; and in such case, upon such finding, your verdict should be for the defendants.

"VIII. That if you are satisfied that the plaintiff, before going upon the scaffolding, observed that one of the braces, or, in the language of the witnesses, *pudlocks*, was a two by four when it should have been a two by six, and that in his judgment at that time a two by four was insufficient, and, notwithstanding such knowledge and impression, the plaintiff nevertheless went upon the scaffold, and that the said brace or pudlock broke in consequence of its insufficiency for the purposes intended, that in such case the plaintiff took the risk, with full knowledge, into his own hands, he cannot recover, and your verdict should be for the defendants."

Considering these instructions with each other as a whole it appears to me that the jury were sufficiently and properly instructed upon the issues of fact, and the law of the case. I speak specially in reference to the point to which the plaintiffs in error cite authorities to the proposition that if the injury was caused by the negligent or unskillful conduct of any of the other men employed as bricklayers or laborers on the building, then, being co-employees of the defendant in error, injury, through their unskillful or negligent conduct on the work, was one of the risks and perils of life necessarily incident to the trade and service in which he was employed, and the consequences of which he must bear alone. Eliminating the qualifying word "unskillful" from the proposition, and, as I believe, it fairly states the law applicable to one view of the evidence in the case, and this view is sufficiently met in the fourth instruction of the court of its own motion, I will add that sufficient

facts to bring the case within that instruction were testified to by the defendants and the witness Cathers. But if, on the other hand, one or both defendants as contractors were usually present at the work, superintending and directing the masons and laborers, and the manner and use of material in the construction of the scaffolding, and actually gave directions and superintended the defective scaffold, and personally directed the injured party to go upon it and follow his work, then the question of "co-employees" becomes foreign and inapplicable. It then becomes the defendants' own negligence which caused the injury (if in the opinion of the jury it was caused by a defective scaffold), and for the negligence of one employe another takes no risk.

This view was, as I conceive, fairly presented by the court in its instruction. The doctrine of contributory negligence was presented to the jury in the eighth instruction on request of defendants, and being thus submitted, the question whether the party complaining was guilty or not of contributory negligence was one to be left to the jury. (*Orleans Village v. Perry*, 24 Neb., 831.)

As to the eighth instruction, I will observe that it goes as far, when applied to the evidence in the case, as it was prudent for the court to instruct in favor of the plaintiffs in error.

It will be conceded that the primary cause of injury is not very clearly located by the testimony. It is certain that it was the result of the giving away of the support and the falling of the scaffold, causing the injured party to be thrown over the wall, and to fall from a height of thirty-five feet.

Whatever contributed to the insufficiency of the support and caused it to give way was the undoubted cause of the injury. There is evidence tending to prove that the scaffold at the point of weak support was overloaded; but there is no testimony tending to prove that the weight was

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sufficient to break down a scaffold of that kind if properly constructed of proper material. There is further evidence that the scaffold was not constructed in the usual, workmanlike manner, of material of proper strength and dimensions required for the purpose. This evidence being before the jury, and, as we have seen, submitted to their consideration by careful instructions from the court, it is believed that no sufficient objections to the finding and verdict of the jury have been shown.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

WEISZ & MALL CO. V. DAVEY ET AL.

[FILED JANUARY 28, 1890.]

1. **Partnership: ACTION BY: PETITION.** A petition in which the plaintiffs are set out and described as "Weisz & Mall Co., a partnership doing business in the state of Iowa," *held*, bad, on motion to dismiss.

ERROR to the district court for Dakota county. Tried below before NORRIS, J.

Wigton & Lohr, and *Fair & Evans*, for plaintiff in error:

While it is true that, under section 24 of the Code, the action should have been brought in the individual names of the partners, yet the mistake was one of form only, and the rights of defendants were in no way prejudiced. Moreover, a plea in abatement, not a motion to dismiss, is the proper remedy. (*Smelt v. Knapp*, 16 Neb., 53; *Gilman v. Cosgrove*, 22 Cal., 357; *Hite v. Hunton*, 20 Mo., 286; *For-*

ler v. Williams, 62 Id., 403; *Haskins v. Alcott*, 13 Ohio St., 210; *Porter v. Cresson*, 10 S. & R. [Pa.], 257; *Downer v. Morrison*, 2 Gratt. [Va.], 255; Hawes, Parties, sec. 88; Maxwell, Pl. & Pr. [5th Ed.], 176; Chitty, Pl., 248, 451.) There is enough in the allegation to give defendants notice of the capacity of plaintiff to sue in the firm name, and a motion to make more specific would perhaps have been proper. (*Jansen v. Mundi*, 20 Neb., 323.) The Code should be liberally construed in order that substantial justice may be done. (Code, sec. 1; *State v. Russell*, 17 Neb., 204.)

Jay Bros., contra:

In order to entitle a firm to bring an action, the name of each of its members must be pleaded, or it must be shown that the firm is doing business in this state. (Code, sec. 24; *B. & M. R. Co. v. Dick*, 7 Neb., 242; *Scofield v. State Nat. Bank*, 9 Id., 316; *King v. Bell*, 13 Id., 409; *Leach v. Milburn Wagon Co.*, 14 Id., 106; *Haskins v. Alcott*, 13 Ohio St., 217.) In *Smelt v. Knapp*, the objection was raised by a plea to the jurisdiction, not by a motion to dismiss. Besides, the latter motion has the same effect as a plea in abatement, and even if defective, was good enough for such a petition.

COBB, CH. J.

The plaintiff in error brought suit under the name of Weisz & Mall Co., March 25, 1889, before E. B. Wilson, county judge, to recover the balance of its account as commission merchants, of \$80, against Davey & Barry, defendants.

The defendants appeared June 17 following and "moved the court to dismiss the action for the reason that the plaintiff had not set out the names of the partners in the plaintiff's company."

This motion was overruled, and judgment rendered for the plaintiff.

The defendants removed the proceedings to the district court by petition in error, and on July 10, following, the judgment of the county judge was reversed and the cause dismissed at plaintiff's costs. The plaintiff in error now brings the cause to this court, and assigns the following errors of the district court :

1. In sustaining the petition in error.

2. In overruling the decision of the county judge in overruling the defendants' motion to dismiss the action for reasons stated.

The plaintiffs in error, in the brief of counsel, frankly admit that, being an unincorporated company, organized to do business and doing business in the state of Iowa, and not in the state of Nebraska, the case is not within the provisions of section 24 of the Civil Code. They also concede that the bill of particulars was defective in not setting out the names of the persons constituting the plaintiff firm. But they contend that that defect could not be taken advantage of by motion, but only by answer in the nature of a plea in abatement.

It was sought by an early statute of Indiana to dispense with the use of formal declarations in actions at law in that state, and the statute provided that in lieu of a declaration in an action on a promissory note, it would be sufficient to present and file such note, or a copy thereof. Under that statute the case of *Hays et al. v. Lanier et al.*, 3 Blackf. (Ind.), 322, was prosecuted.

Under said statute a company of merchants trading in the name and style of Stapp, Lanier & Co. brought the action there considered, without a declaration, against James W. Hays and Thomas Heck, merchants trading under the style and firm of Hays & Heck, and John Wheatly, upon a promissory note in these words and figures:

"\$374.73.

"Three months after date we, or either of us, promise to pay Stapp, Lanier & Co. three hundred and seventy-four dollars and seventy-three cents, with interest from date, for value received.

HAYS & HECK.

"JOHN WHEATLY."

A writ was issued accordingly and served on the defendants, who appeared and moved to quash the writ, which was overruled. They then filed a general demurrer, which was also overruled, and a final judgment rendered, that Stapp, Lanier & Co. recover, etc. On error to the supreme court the judgment was reversed.

The court in the opinion said: "There is no principle more certainly and satisfactorily settled than that in all actions the writ and declaration must both set forth accurately the Christian and surname of each defendant, unless the party is a corporation known to the law by an artificial name, and is authorized to sue and be sued in such corporate name. This rule of law and practice is sustained by reason and justice, and the highest authorities. In the case now before us, the defendants in error are not a corporation known to the law by the artificial name of Stapp, Lanier & Co.; they are natural persons and must sue in their individual names. It is also equally well settled that in all cases of contracts, if it appears upon the face of the writ or declaration that there are other obligees who are not named, it is fatal on demurrer. In this case, the note and writ both show that there are other obligees who are not named; this is fatal on demurrer. * * *

"It is, however, said that the statute authorizes such proceedings as these. That appears to us to be an entire mistake. The statute dispenses with a formal declaration, but it does not dispense with the parties to the suit. Suppose the payees to be idiots, lunatics, or infants, does the statute remove their disabilities and authorize them to sue in their own names without committees, guardians, etc.?

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The case is a very plain one; the statute has nothing whatever to do with the subject of the parties to the suit."

In the same court the case of *Hughes v. Walker, Carter & Co.*, 4 Blackf. (Ind.), 51, arose, in an action originally brought in a justice's court in the name of *Walker, Carter & Co.*, as plaintiffs, against *Hughes*. The judgment of the justice was, "That the *plaintiffs* have judgment," etc. *Hughes* appealed to the circuit court, where he moved to dismiss the cause on the ground that it was brought in the name of the firm, when it should have been brought in the name of the individuals composing the firm. The motion was overruled, and a judgment rendered against him similar to that in the justice's court. On error to the supreme court the judgment was reversed. The court in the syllabus says: "If an unincorporated company sue in the name of the firm, the suit will be dismissed on motion."

This case was followed in those of *Barrackman v. Worthington*, 5 Blackf. (Ind.), 213, and *Tanner v. Swearengen & Co.*, 6 Id., 277.

In the case of *Bentley and others v. Smith and others*, 3 Caines (N. Y.), 170, the declaration in the name of Thomas Bentley, Allen Potter, John P. Becker & Co. was held bad on general demurrer.

We have seen that the supreme court of Indiana made no distinction between a motion to dismiss and a general demurrer as a means of taking advantage of a defect in the names of the parties plaintiff, and I do not think that there is any substantial difference when applied to a question of the character of that which we have here considered. The motion of defendant in error, made in the county court, was sufficient to raise the question and should have been allowed.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

FRED REEVES V. HENRY NYE.

[FILED JANUARY 28, 1890.]

1. **Statute of Limitations: ACCOUNT STATED.** An action was brought by A against B upon an account for threshing grain in the years 1879, 1881, 1882. The action was brought in 1884, the summons served on the defendant being dated March 23 of the latter year. *Held*, That as more than four years had elapsed the item for threshing in 1879 was barred by the statute of limitations.
2. ——— : **CONVERSION.** In May, 1879, B loaned to A a boar of a valuable variety of swine upon a contract to return the same in ten or fifteen days, and pay a certain consideration for his use. A did not return the animal as he had promised, and in June following B requested that the animal be returned, which was not done, and A afterwards castrated and sold the animal. *Held*, That while B could waive the tort and set up his damages as a set-off to an action on contract, yet that the statute of limitations began to run from the time of the demand for a return of the animal in June, 1879.

ERROR to the district court for Madison county. Tried below before POWERS, J.

Robertson & Campbell, and *H. C. Brome*, for plaintiff in error, cited : *Stickney v. Smith*, 5 Minn., 390 ; *Morish v. Mountain*, 22 Id., 564 ; *Harrison v. Baker*, 15 Neb., 43 ; *Hall v. Strode*, 19 Id., 673 ; *Howard v. Ritchie*, 9 Kan., 102 ; 1 Addison, Torts, 496 ; 6 Wait's Act. & Def., 146.

Allen, Robinson & Reed, *contra*, cited : Code, sec. 12 ; *Reizenstein v. Marquardt*, 75 Ia., 294 ; 39 N. W. Rep., 506.

MAXWELL, J.

The plaintiff brought an action against the defendant before a justice of the peace upon an account as follows :

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HENRY NYE to FRED REEVES, Dr.

Fall of 1879, to threshing 296 bushels of wheat, at 4 cents.....	\$11 84
Fall of 1879, to threshing 250 bushels of oats at 2 cents.....	5 00
Fall of 1881, setting machine.....	5 00
Fall of 1882, threshing 104 bushels of wheat, at 4 cents.....	4 66
Fall of 1882, threshing 338 bushels of oats, at 2½ cents	8 45
	<hr/>
	\$34 95

The summons issued by the justice and served on the defendant is dated March 22, 1884.

The defendant filed a bill of his set-off as follows:

1881.

Sept., '81, ten pigs at \$2.00 each.....	\$20 00
Sept., '81, work and labor.....	11 55
Sept., '81, one boar pig	25 00
Sept., '81, damage in retaining same.....	20 00

The aggregate of the items of set-off is claimed to be \$76.50.

On the trial before the justice judgment was rendered in favor of the plaintiff, from which the defendant appealed.

On the trial in the district court a verdict for a small amount was returned in favor of the defendant and judgment rendered thereon. A motion for a new trial and also a petition for a new trial were filed in the district court, and overruled, to which exceptions were duly taken, and the overruling of the same is now assigned for error.

Both parties plead the statute of limitations as to the part of the claim of the adverse party, and it is clear from the undisputed testimony that the plaintiff's account for threshing in 1879 is barred, and the jury should have been so instructed.

The principal controversy is in regard to the defendant's principal items of set-off.

The defendant testifies as follows:

Q. You may state whether in September, 1881, you were the owner of a boar pig or hog.

A. It was not in 1881.

Q. When was it?

A. In 1879.

Q. You may state to the jury what the description of the hog was, what his character was.

A. I had a Chester white full-blood hog in 1879. In May, 1879, Mr. Reeves came to me to get the use of that hog, and he came three times before I let the hog go; he was large and the weather was a little warm, and it was somewheres close to two miles off, and I told him to fetch his sows over and leave the hog at home. He came one day I am not certain, it was in May, I was working on corn ground getting ready for planting, it was wet and kind of cool, and I said to him, If you will take the hog and use him, and fetch him back in ten or fifteen days and give me one pig from each sow you can take him in that way. He and a little boy that he had took the hog and drove him home. Well, after this time had expired, I cannot say exactly, somewhere along about the last of June of the same year, I met him and asked him why he did not fetch my hog back. I don't know what comment he made—he intended to fetch him back. That is the last I ever saw of the hog.

He also testifies that the hog was of the value of twenty dollars.

The plaintiff testifies that the defendant made no demand on him for the hog at the time stated or any time; that he purchased the animal of a third party, and he introduced testimony tending to show that the defendant, about the time the plaintiff procured the animal in question, had sold the same to the person from whom the plaintiff claims to have purchased it. The plaintiff also testifies that some

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time after he had procured the hog—when does not appear, he castrated him and afterwards fattened him and sold him.

The question therefore arises as to what time the statute of limitations began to run against the defendant's claim.

In a case of this kind the party injured has a choice of remedies. He may allege the contract under which the property was delivered and recover damages for a breach thereof, or he may bring his action in tort on the ground of neglect of duty. The reason for this distinction is very clearly stated by Littledale, J., in *Burnett v. Lynch*, 5 Barn. & Cress, 609, as follows: "Where there is an express promise, and a legal obligation results from it, then the plaintiff's cause of action is most accurately described in *assumpsit*, in which the promise is stated as the gist of the action. But where, from a given state of facts, the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, there, although *assumpsit* may be maintainable upon a promise implied by law to do the act, still an action on the case founded in tort is the more proper form of action, in which the plaintiff in his declaration states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach." (*Perry v. Granger*, 21 Neb., 579; *Swan's Pl. & Prac.*, 48-9; *Maxw., Pl. & Prac.* [4th Ed.], 34.)

In this case the defendant, if his testimony is to be believed, elected to bring his action on a breach of the contract, and hence the statute began to run when the contract was broken, viz., in June, 1879, and an action on the claim at the bringing of this suit was barred. (*Howell v. Young*, 5 Barn. & Cress., 259; *Rankin v. Woodworth*, 3 Penn. [P. & W.], 48; *Smith v. Fox*, 6 Hare, 386; *Battley v. Faulkner* 8 Barn. & Ald., 288; *Ang. on Lim.*, sec. 137.)

This feature of the case was not presented to the jury by proper instructions.

But even if the cross action had been for the conversion,

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still it would have been barred, as the statute began to run when the first demand was made by the defendant for a return of the property, and he thereafter held the same wrongfully. (*East India Co. v. Paul*, 1 Eng. Law and Eq., 44.)

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

GEORGE N. BEELS v. JOHN FLYNN.

[FILED JANUARY 28, 1890.]

1. **Fraudulent Conveyances: PURCHASER: WHEN CHARGED WITH NOTICE.** A purchaser of an entire stock of goods—all the property of the debtor—cannot close his eyes to the circumstances under which he purchases the stock and the probable effect the means of payment (in this case mostly a note of the purchaser) will have upon creditors of the seller in hindering, delaying, or defrauding them of the payment of their claims.
2. ———: ———. *Held*, That the plaintiff in error was not a *bona fide* purchaser, and not entitled to protection.
3. ———: **STATUTE CONSTRUED.** The words “as against the person so hindered, delayed, or defrauded,” in section 17, chap. 32, Comp. St., limit the right of action to the parties named—in other words, exclude mere volunteers who have no interest in the result of the suit, but do not affect any one who is hindered, delayed, or defrauded of his debt by a fraudulent transfer.
4. **Answer**, liberally construed, *held*, sufficient after verdict.

ERROR to the district court for Madison county. Tried below before POWERS, J.

28	575
37	608
28	575
38	543
28	575
48	209
28	575
49	57
28	575
61	240

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Wigton & Whitham, for plaintiff in error:

Under sec. 17, ch. 32, Comp. Stats., a fraudulent conveyance is void only "as against the person so hindered, delayed, or defrauded." There must be both an intent to defraud and an actual hindrance of creditors. (*Aultman v. Heiney*, 59 Ia., 654; *Baldwin v. O'Laughlin*, 28 Minn., 68; *Rice v. Perry*, 61 Me., 145; *Sell v. Bailey*, 119 Ind., 51; *Knight v. Glasscock*, 51 Ark., 390; *Mason v. Pierron*, 63 Wis., 239; *Wait*, Fraud. Conv., sec. 143.)

Holmes & Hays, contra.

MAXWELL, J.

This action was brought by the plaintiff against the defendant in the district court of Madison county to recover a judgment for the conversion of "The entire stock of harness, whips, saddles, saddlery hardware, collars and leather, the safe, show case, and stove which were in the harness shop in Beels' block, in the city of Norfolk, Nebraska, at the time hereinafter mentioned, formerly occupied by H. L. Spaulding, together with all the tools and fixtures belonging to said shop, which goods and chattels were of the value of \$1,163.26.

"On the 28th day of April, 1888, the defendant obtained possession of the said goods and chattels, and unlawfully and wrongfully converted the same to his own use, to the damage of the plaintiff in the sum of \$1,163.26."

Flynn answered the petition, and alleged that he was the sheriff of Madison county, and levied upon the property in question "by virtue of an order of sale issued by the county court of Madison county, upon a judgment rendered in said court in favor of Marks Bros. Saddlery Co. and against H. L. Spaulding. Marks Bros. Saddlery Co. intervened and answered:

"That on the 28th day of April, 1881, your petitioner

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commenced its action in the county court against L. Spaulding, on an account for goods sold and delivered, and caused an attachment to be issued in said action, levied upon a certain stock of harness, saddlery, etc., being the property described in plaintiff's petition; that afterwards, to-wit, on or about the 27th day of June, 1888, the defendant, as sheriff of said county, sold the said property by virtue of an order of sale issued by the county court aforesaid, on a judgment rendered in said action; that the said defendant has no interest in said property, or the proceeds of the sale thereof—your petitioner is the real party in interest; that the said property so levied upon and sold by the defendant was in the possession of the said H. L. Spaulding, and the property of said Spaulding on the day preceding the levy of said attachment, and until a late hour of the night preceding the said levy; that it constituted the entire stock in trade of said Spaulding, who had been for several years before, and until said time, engaged in the harness and saddlery business at Norfolk, Neb.; that said Spaulding was largely indebted to your petitioner, and other dealers in the same line of goods, and the said Spaulding was, and had been for several years, carrying on his said business in a building belonging to and rented of the plaintiff, who was fully advised of his financial condition; that the said Spaulding pretended to sell said stock of goods to plaintiff, but such sale was made with the intent to defraud your petitioner, and other creditors of said Spaulding, and no sufficient consideration was paid for the same, and the purchase thereof, if made at all by plaintiff, was so made with full knowledge on the part of said plaintiff of such fraudulent intent."

On the trial of the cause the jury returned a verdict for the defendant, and a motion for a new trial having been overruled, judgment was entered on the verdict.

A large number of errors are assigned in the petition in error which need not be noticed, as it is apparent from the

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testimony that the verdict and judgment conform to the proof.

The testimony tends to show that in April, 1888, one H. L. Spaulding was conducting a harness shop in Beels's block, in the city of Norfolk, Nebraska, and that he had been engaged in that business for about four years; that at that time he made a verbal agreement with one Hopkins to purchase his stock at ten per cent below the wholesale price; that in pursuance of this agreement an invoice of the stock was taken, which amounted to \$1,205; that Hopkins thereupon refused to take the stock at the invoice figures, but offered \$950 for the stock, which Spaulding refused. Spaulding at this time testifies that he was owing for stock from \$900 to \$1,100, some of the claims for which were due, and there is testimony tending to show that he had asked an extension of time for the payment of some of these claims.

Some of the agents of the creditors were present in Norfolk on the day the alleged sale to Beels took place, and others were expected and were there the next day.

Mr. Beels and Spaulding were at Madison on an excursion, and while there, late at night, the following bill of sale was prepared and signed:

"This article witnesseth that I, H. L. Spaulding, for and in consideration of \$1,000, in hand paid, the receipt whereof is hereby acknowledged, do hereby sell and convey unto Geo. W. Beels the following described property, to-wit:

"All my stock of harness, whips, saddles, saddlery hardware, collars, leather, safes, show-cases, and stove now in my harness shop in Beels's block, in the city of Norfolk, Nebraska, together with all my tools and other fixtures belonging to said shop, except my small bench, tools, such as awls, round knives, etc., such as belong to an individual set: for a specific description of said stock, tools, etc., reference is hereby made to a certain bill invoice of same

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made in the presence of H. L. Spaulding, Burt Shearer, D. A. Hopkins, and Mr. Cooley, on April 25th, 1888, which bill is now in said safe, and is made a part hereof.

"And I also in consideration of the further sum of \$300, I hereby sell and convey unto said Geo. W. Beels all my accounts as now appears on my books, together with books containing same, amounting to about \$500, and not less than \$400.

"Possession of said shop and said stock is hereby transferred to said Geo. W. Beels.

"Witness my hand the 20th day of April, 1888.

"H. L. SPAULDING.

"Witnesses:

"W. H. LAW.

"W. H. PECK."

This was all the property possessed by Mr. Spaulding except some money and notes derived from the sale of his homestead, and which seem to have been reserved for the purchase of another homestead. It is claimed on behalf of the plaintiffs in error that the testimony fails to show that this was all of Spaulding's property, but this is a mistake, as Spaulding's own testimony shows such to be the case. The book accounts, if placed at \$400, would make \$1,605—which Beels received from Spaulding. For this, according to his own testimony, he satisfied a debt of \$100 due to himself. He assumed a note of \$285 at one of the banks in Norfolk, and gave his own note to Spaulding for about \$900.

On the day after the sale he was informed by an attorney of one or more of the creditors that the sale was regarded as fraudulent as to creditors, but if the creditors could reach the amount due upon the note they would seek relief in that way.

After this, but apparently on the same day, Beels traded land to Spaulding for the note.

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Both Beels and Spaulding testify that this trade for land was not contemplated when the bill of sale was executed.

It evidently was done, however, to prevent Beels being garnished and the creditors paid. A creditor may collect his claim from a failing debtor and not be chargeable with aiding him to defraud his creditors, and such creditor may accept payment in goods, so that the goods are purchased at a fair price and no more taken than will pay the debt. The prohibition of the statute applies to transfers made by a debtor and not to a creditor.

But when a debtor has incurred debts on the strength of his being the owner of certain property, his creditors have an equitable claim thereon, and may insist that he use his property honestly and fairly and without any intention of hindering and delaying them in the collection of their claims (*Seymour v. Wilson*, 19 N. Y., 417), and if the debtor dispose of his property in such a way as to violate the trust reposed in him at the creation of the debt, by disposing of his property in such a manner as to hinder and delay or defraud creditors, and the person purchasing has notice of such intent, he will not be protected. (*Weed v. Pierce*, 9 Cow., 722; *Smith v. Sands*, 17 Neb., 498.)

In the latter case it is said: "A debtor, while the owner of his property, sustains two distinct relations in regard to it, viz., as owner and as *quasi-trustee* for his creditors. If his creditors have taken no lien upon the property as security, they may be said to have given him credit upon the implied agreement that his property shall, if necessary, be applied to the payment of his debts, and such creditors have an equitable lien upon the property for that purpose. (Bump. on Fraudulent Conv., 13, 14; *Eppes v. Randolph*, 2 Call., 125; *Seymour v. Wilson*, 19 N. Y., 417.)

"The law requires the debtor to act in good faith with his creditors and apply his property, not exempt, if need be, to the payment of his debts. If he attempts to evade this duty, and for the purpose of hindering or defrauding

his creditors by transferring his property to another without consideration, or with knowledge on the part of grantee of the fraudulent intent, such grantee will take the property charged with the trust, and if he converts the property into money he will be liable for its value, less any valid liens subsisting against it."

A purchaser cannot close his eyes to the circumstances under which a debtor sells his goods—his entire stock. If he buys at a considerable discount, and the effect of the proposed means of payment must be to hinder and delay if not defraud creditors of the seller, the purchaser will buy at his peril.

Good faith, honesty, and fair dealing require that the debtor's property be applied to the payment of his debts, and it is the duty of the courts to frown upon all attempts of a debtor and purchaser of his goods to evade that duty.

It is evident that Mr. Beels well knew that the effect of his alleged purchase would be to hinder and delay if not defraud the creditors of Spaulding, and that he is not a *bona fide* purchaser. It is claimed by the plaintiff in error that the language of sec. 17, chap. 32, Comp. St., that "Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents and profits thereof, made with the intent to hinder, delay, or defraud creditors or persons of their lawful rights, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suit commenced, or decree or judgment suffered, with the like intent as against the person so hindered, delayed, or defrauded, shall be void," is restrictive, and hence the words at the close of the section, "against the person so hindered, delayed, or defrauded," limit the right of recovery to one that is hindered, delayed, or defrauded by the acts complained of. It is claimed that this provision is peculiar to this state.

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An examination of the statutes of the several states, however, shows that a provision of similar import is found in many if not most of the states, and is also found in the second section of 13 Eliz., chap. 5, from which, in substance, our statute appears to have been taken.

The evident intention was to limit the right of recovery to those who had suffered by the act complained of, while as between the parties to it the sale would not be disturbed. In other words, a mere volunteer who has no interest in the result of the suit cannot complain even if the transfer was well known to him to be fraudulent, because he sustains no injury by such fraud.

When, however, as in the case at bar, the creditors who have been defrauded complain, their right to contest the sale is unquestionable.

Some objection is made to the answer that it does not charge fraud on the part of Spaulding and Beels.

In our view, however, the answer, liberally construed, after a verdict does state sufficient to entitle the creditors to relief.

It is unnecessary to notice the instructions.

The judgment is clearly right and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JOSEPH C. MITCHELSON ET AL. V. CATHARINE SMITH
ET AL.

[FILED JANUARY 28, 1890.]

Marshalling Assets: HOMESTEAD: MORTGAGE. A and B, husband and wife, executed a mortgage to C upon their homestead and other real estate. Afterwards B, the wife, alone executed a mortgage to D upon all the real estate covered by the first mortgage except the homestead. *Held*, That the first mortgagee would not be required to exhaust the funds derived from a sale of the homestead before resorting to the land covered by the second mortgage in order that both debts could be paid; that the court would impose no obligations in the nature of liens to secure debts on the homestead not placed thereon by the parties themselves, or by statute as for taxes thereon, and that the securities would not be marshalled where the effect would be to place an additional liability against the homestead to which both husband and wife had not duly assented.

ERROR to the district court for Gage county. Tried below before BROADY, J.

Hazlett & Bates, for plaintiffs in error, cited: *Story*, Eq. Jur., 636; *Willard*, Eq. Jur., 337-8; *Maxwell*, Pl. & Pr., 669; *Davenport Plow Co. v. Mewis*, 10 Neb., 821; *Lee v. Gregory*, 12 Id., 284; *Traphagen v. Irwin*, 18 Id., 199; *Fassett v. Traber*, 20 Ohio, 544.

Burke & Prout, *contra*, cited: *McCreery v. Schaffer*, 26 Neb., 173; *Armitage v. Toll*, 64 Mich., 412.

MAXWELL, J.

On December 21, 1883, the defendants executed and delivered to Joel C. Williams a mortgage on a part of lot No. 15, in block No. 1, in the town of Blue Springs, and also on lots 3 and 4, in block 9, in Hall's addition to Blue

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Springs, to secure the sum of \$186.92. This property stood in the name of Catharine Smith, and both Catharine Smith, and her husband, Jacob W. Smith, signed the mortgage.

On February 2, 1884, the defendant Catharine Smith executed and delivered to the plaintiffs a mortgage on that portion of the same property described as a part of lot 15, in block No. 1, to secure the sum of \$425. This mortgage was signed only by the defendant Catharine Smith.

On the 7th day of January, 1886, the plaintiffs brought an action in the district court of Gage county, Nebraska, to foreclose the last mentioned mortgage. The prior mortgagee, Joel C. Williams, was made a party to this suit, and the allegations as to him in said foreclosure petition were as follows:

"The defendant, Joel C. Williams, claims a lien on said premises by virtue of a mortgage executed and delivered to him by said defendants on or about December 21, 1883, on the premises hereinbefore described, together with other property, to secure the sum of \$186.92, and plaintiff alleges the fact to be that the other property included in said mortgage of said Joel C. Williams is sufficient to pay and is of sufficient value to secure said Williams his claim of \$186.92, and that the property herein described is not of sufficient value to pay both the lien of these plaintiffs and the lien of the defendant Williams, and not worth over the sum of plaintiffs' said mortgage."

The prayer was the ordinary form of prayer of foreclosure with the addition that the defendant, Joel C. Williams, be required to exhaust his other security on his indebtedness before having or receiving any of the proceeds of the sale of the premises described in plaintiffs' mortgage. In the meantime Joel C. Williams disposed of his mortgage to the defendant Charles A. Murdock, who was substituted as defendant in place of Williams. On September 13, 1886, the defendant Murdock filed a cross-

petition asking that his mortgage be declared a first lien on the entire premises and for a foreclosure of the same.

The defendants Catharine and Jacob W. Smith filed separate answers to both the petition of the plaintiff and the cross-petition of the defendant Murdock.

The case was tried to the court, and a decision rendered in the case, finding generally for the plaintiffs, and that plaintiffs had a second lien on part of lot 15, in block 1, for the amount of their mortgage, and finding further that the defendant Murdock had a first lien on this same property, and also on lots 3 and 4, in block 9, in Hall's addition, and ordering the entire property to be sold to satisfy the amounts found due on the first mortgage, the surplus derived from the sale of part of lot 15, block 1, to be applied on the second mortgage. The court also found that lots 3 and 4, in block 9, in Hall's addition, constituted the homestead of the defendant, and therefore was not subject to the Mitchelson mortgage. An order of sale was issued on this decree on the 31st day of December, A. D. 1887, and placed in the sheriff's hands, who advertised the property for sale.

On the day of the sale the plaintiffs served on the sheriff a request that he first offer for sale lots 3 and 4 in block 9, Hall's addition to Blue Springs, being the property covered by the prior mortgage of Murdock, and upon which plaintiffs had no lien. This the sheriff refused to do, but sold the part of lot 15, in block 1, which was covered by both mortgages, and upon which the plaintiffs had the second lien for \$425, and in his return says: "The above described real estate, having been sold for enough to pay off the first judgment, interest, and costs, in said order of sale, and the second judgment, not being a lien on lots 3 and 4, in block 9, in Hall's addition to said town of Blue Springs, I did not sell said lots. The second lien returned wholly unsatisfied."

The plaintiffs filed a motion to modify the decree rendered in the foreclosure case to correspond with the fact and

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the judgment and decree actually rendered in the case. The motion was overruled and duly excepted to.

Plaintiffs also filed objections to the sale, which were overruled, and the sale confirmed by the court and deed ordered.

As the mortgage in question created no lien on the homestead, the case was not one in which it would have been proper to marshal the liens and require the first mortgagee, whose mortgage was not signed by both husband and wife, to exhaust the lien on the family homestead before resorting to part of lot 15, block 1, which was covered by both mortgages.

If lots 3 and 4, in block 9, in Hall's addition, were not the family homestead, the plaintiff would be entitled to the relief sought, as the first mortgagee has two funds for the satisfaction of his mortgage, but one of which can be reached by a second mortgagee; but as those lots constitute the homestead the court has no authority to impose a greater burden upon such lots than has been placed thereon by the parties themselves. If it could do so it would be possible to divest the parties of their homestead altogether by compelling them to pay debts, as burdens on the homestead, which were not liens thereon.

The homestead law is remedial in its character, and is to receive a liberal construction to carry into effect its beneficent provisions. No burdens will be placed on the homestead, therefore, not created by the parties themselves, or by the law, as for taxes, nor will a mortgagee of real estate, a part of which constitutes the homestead, be permitted or required to resort to the homestead alone for the satisfaction of his lien, to the exclusion of the other real estate owned by the mortgagor, nor is the case one in which the securities can be marshalled.

The judgment is therefore right and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

PHOENIX INS. CO. OF BROOKLYN V. H. D. READINGER.

[FILED JANUARY 28, 1890.]

1. A motion to quash a bill of exceptions will be effective only where there has been a neglect to comply with the statutory requirements in making up the bill, or other like cause, and cannot be predicated on the failure to file a motion for a new trial.
2. A motion for a new trial must be in writing, and must specify causes therefor, which are sufficient in law to authorize the granting of the same. An oral motion, or one in writing, in which no cause or causes for a new trial are assigned, will not justify the granting of a new trial, nor will the overruling of such a motion be sufficient to present errors of law to either the trial or reviewing court.
3. A plea of tender in an answer is an admission that the amount tendered is due the plaintiff.
4. Review: CONFLICTING TESTIMONY. There being a direct conflict in the testimony, the matter was proper for the consideration and determination of a jury, and where the conflict is in oral testimony and involves the question of the credibility of the witnesses, the court ordinarily will not review such testimony.

ERROR to the district court for Cuming county. . Tried below before NORRIS, J.

M. McLaughlin, and *J. F. Losch*, for plaintiff in error, cited: 1 *Lindley, Partnership*, pp. 12, 14; *Fromont v. Cupland*, 2 Bing. [Eng.], 170; *French v. Styrling*, 2 C. B. N. S., 357.

Uriah Bruner, contra, cited: *Midland P. R. Co. v. McCartney*, 1 Neb., 404; *Mills v. Miller*, 2 Id., 299; *Cropsey v. Wiggenghorn*, 3 Id., 108; *Wells v. Preston*, Id., 444; *Hollenbeck v. Tarkington*, 14 Id., 430; *Roggenkamp v. Dobbs*, 15 Id., 620.

MAXWELL, J.

This action was brought in the county court of Cuming county, where judgment was rendered in favor of the defendant in error.

The case was taken on error to the district court of that county, and the judgment of the county court reversed, and the cause set down for trial, and a trial had, which resulted in a verdict and judgment in favor of the defendant in error for the sum of \$46.92. A petition in error and transcript of the proceedings of the trial were filed in this court, and notice thereof duly given. The defendant in error now moves to quash the bill of exceptions because no motion for a new trial was filed in the court below within the time fixed by statute for filing the same, and therefore the errors, if any, that occurred during the trial cannot be reviewed. But even if the record fails to show that a motion for a new trial was filed within the statutory period, it could form no just ground for quashing the bill of exceptions.

In order to obtain a review of alleged errors which have occurred during the progress of a trial it is necessary to bring them to the attention of the trial court by a motion for a new trial, in order that that court may have an opportunity to review its own rulings, and if it has committed material errors, correct them.

The bill of exceptions, however, where it contains all the evidence in the case, is a record of the trial, and presents to the reviewing court the entire proceedings upon which the verdict and judgment are based.

The statute prescribes the procedure in settling such bills, and if this is observed and the bill duly signed and filed in this court within the time fixed by statute, it will not be stricken from the files or quashed because of a failure to lay a foundation for the review of the alleged errors. In other words, a motion to quash a bill of exceptions, to

be effective, must be based on some objection to the bill itself, either in the manner of its preparation and signing, or in other respects, and cannot be predicated on the want of a motion for a new trial. The motion is therefore overruled.

The record shows that on the 18th day of July, 1888, the verdict was returned and judgment entered thereon on that day. The journal entry is as follows:

"H. D. READINGER

v.

THE PHOENIX INSURANCE COM-
PANY, BROOKLYN, N. Y.

"This cause came on to be heard on the motion of the defendant for a new trial, on consideration whereof the court does overrule the same, to which ruling of the court the defendant duly excepted."

The evidence tends to show that no motion for a new trial was in fact filed at that time, nor is there any in the record of that date or any explanation or attempt to explain the above entry.

The record does show that on August 29, 1888, a motion for a new trial was filed as a matter of right, and that no action has been had thereon. It is probable that the motion was made orally and passed upon by the court with a promise of the moving party to file a written motion as of that date, and that it was neglected. This practice should not be tolerated.

The filing of a motion for a new trial is not designed as a matter of mere form, but as a means of correcting errors.

A capable, conscientious judge may see that he has committed an error which has materially affected the rights of one of the parties or has prevented a fair trial, and that the only mode of correcting the error is by granting a new trial. He therefore performs what he deems to be his duty and sustains the motion. He must know, however, the grounds of the motion—in other words, the cause or causes of grant-

Phoenix Ins. Co. v. Readinger.

ing a new trial, because unless a sufficient legal cause is assigned, the motion cannot be sustained. (*Spencer v. Thistle*, 13 Neb., 227; *Cockle Mfg. Co. v. Clark*, 23 Id., 704.) The granting of a new trial therefore is not an arbitrary exercise of power, but a duty to be performed for adequate cause, and such cause or causes must be assigned in the motion, which motion in all its parts the statute requires to be in writing. An oral motion, therefore, is insufficient.

The action is brought to recover the sum of \$91.92, "which sum the said defendant then and there agreed to pay this plaintiff therefor."

The plaintiff in error in its answer denies each and every allegation in the petition not admitted, and, second, alleges that before the bringing of the action, "to-wit, on the 24th day of August, 1887, it tendered to the plaintiff, by way of compromise and to avoid litigation, the sum of \$2.05, which he refused to receive, and the defendant has ever since been and still is ready to pay said sum to plaintiff," etc. This is a tender and admits that the amount tendered is due the defendant in error. (*Murray v. Cunningham*, 10 Neb., 170; *Cobbey v. Knapp*, 23 Id., 579; *Huntington v. Zeigler*, 2 O. S., 10; *Babcock v. Harris*, 37 Ia., 409; *Huntington v. Am. Bank*, 6 Pick., 340; *Cox v. Brain*, 3 Taunt. [Eng.], 95.)

The plea of tender is very different in its effect from an offer of the defendant to allow judgment to be taken against him for a specified sum.

In the latter case it is unnecessary to plead the amount tendered in the answer, nor need any mention be made of it therein.

The answer in this case in effect admits that a specified sum is due the defendant in error. The amount of this indebtedness is the principal question in dispute. Upon this point there is a direct conflict in the evidence, and the question was one proper for a jury to consider and determine, and where, as in this case, the conflict is in the oral

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testimony of witnesses, and involves the question of the credibility of such witnesses, the court ordinarily will not review their testimony.

There is no error in the record that can be reviewed and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

WALTER KNUTZEN V. CHARLES E. HANSON ET AL.,
APPELLEES,
IMPLEADED WITH W. J. COOPER ET AL., APPELLANTS.

[FILED JANUARY 23, 1890.]

1. **Mechanic's Liens : PROCEEDINGS TO ESTABLISH.** Where notes are given for the payment of the amount due a contractor for work and material furnished in putting in pipes, radiators, etc., for steam-heating a building, copies of such notes, duly filed in the proper office, accompanied by an affidavit of the proper party, setting forth that the debt was incurred under a contract with the owner of the building for the putting in of such material in said building, and that said notes are unpaid, etc., for the purpose of obtaining a lien under the statute upon the premises, are sufficient to entitle the party to a lien.
2. **Warranty : HEATING APPARATUS.** Where a party contracted with the owner of a building to put in steam pipes, radiators, etc., for the purpose of heating the building, the owner to furnish the boiler, and it appeared that the boiler leaked, and was unfit for the purpose intended, and consumed a large amount of fuel, *held*, that defects in the boiler could not be charged to the party who furnished the pipes and radiators, and as such material appeared to conform to the contract, the parties furnishing the same were entitled to recover.

APPEAL from the district court for Buffalo county.
Heard below before HAMER, J.

Lamb, Ricketts & Wilson, for appellants:

Where, as in this case, notes have been given but the account is not adjusted, an itemized statement is not imperative, and the mechanics' lien law should be liberally construed in order to give effect to its provisions. (*Rogers v. Hotel Co.*, 4 Neb., 54; *Manly v. Downing*, 15 Id., 637; *Mfg. Co. v. Hensman*, 10 Ohio St., 152.) A single item for two houses on separate lots is a sufficient compliance with the first clause of section 3 of the mechanics' lien law. (*Doolittle v. Plenz*, 16 Neb., 153; *Ballou v. Black*, 17 Id., 389.) Under statutes like ours, a mere statement of the amount, without items, has been held sufficient. (*Brennan v. Swasey*, 16 Cal., 140; *Selden v. Meeks*, 17 Id., 128; *Ricker v. Joy*, 72 Me., 106; *Sexton v. Weaver*, 141 Mass., 273; *Lonkey v. Wells*, 16 Nev., 271.) Three remedies are open to a purchaser with a warranty. (1 Benjamin on Sales, sec. 894; *Smith v. Evans*, 13 Neb., 314; *Merrill v. Nightengale*, 39 Wis., 247.) None of these has Hanson sought to employ. His only evidence is to the effect that the apparatus as a whole would not work, which might be true and yet not form a defense coming under any recognized rule of law.

Moore & Jones, for appellees Hanson and Moore:

Appellants have no lien since they failed to file a copy of their written contract, and an itemized statement of the labor and material furnished. (Comp. Stats., ch. 54, art. 1, sec. 3; *Manly v. Downing*, 15 Neb., 637.) The mechanics' lien law is purely statutory, and one who seeks the aid of its provisions must show a strict compliance with them. (Wells, *Mechanics' Liens*, p. 15; *Green v. Ely*, 2 G. Greene [Ia.], 508.) The cases cited by appellant, on this branch of the case, are not in point.

MAXWELL, J.

This action was brought in the district court of Buffalo county, by the plaintiff against the defendants, to foreclose a mechanic's lien on certain premises in the city of Kearney. To this petition Cooper & Cole Bros., partners, filed an answer in the nature of a cross-petition. To this answer, asking affirmative relief, Robt. A. Moore filed an answer in which he alleged, in substance, that he was a *bona fide* purchaser of said premises after the filing of the alleged lien, and that he had no notice, actual or constructive, of the alleged lien of Cooper & Cole Bros., and that, therefore, he is entitled to protection, and as to him at least, such lien is void.

The claim of the plaintiff was satisfied before the trial, and hence the contest was between the defendants on the issues made by the pleadings.

The court found against Cooper & Cole Bros. and dismissed the action as to them, from which they appealed to this court.

Two questions are presented by the record: First—Had Cooper & Cole Bros. a valid lien upon the premises? And, second—Did they comply with the terms of a certain contract which will presently be set out?

The proceedings to obtain a lien were as follows:

“\$261.50. KEARNEY, NEB., Jan. 19, 1887.

“Fifteen days after date, I promise to pay to the order of W. J. Cooper & Cole Bros., at First National Bank Kearney, the sum of \$261.50, value received, with ten per cent interest from date, the interest payable annually. Defaulting interest to draw same rate of interest as principal; and I agree to pay a reasonable attorney's fee, provided by law, for the collection of this note, in case it shall be collected by attorney or by suit. The attorney's fee to be taxed as part of the costs of the case.

“C. E. HANSON.”

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"January 19, 1887, to one note in the words and figures following :

" '\$261.50. KEARNEY, NEB., January 19, 1887.

" Thirty days after date, I promise to pay to the order of W. J. Cooper & Cole Bros., at the First National Bank of Kearney, the sum of \$261.50, value received, with ten per cent interest, the interest payable annually. Defaulting interest to draw same rate of interest as principal; and I agree to pay a reasonable attorney's fee, as provided by law, for the collection of this note, in case it shall be collected by attorney or by suit. The attorney's fee to be taxed as part of the costs of the case.

C. E. HANSON.

" 'No. 6014.'

" Total amount due on the above notes is \$523, together with interest at ten per cent from January 19, 1887.

" STATE OF NEBRASKA, }
" LANCASTER COUNTY, } ss.

" W. J. Cooper, being first duly sworn, deposes and says that he is one of the firm of W. J. Cooper & Cole Bros.; that the above notes, amounting to \$523, against C. E. Hanson are just and correct and that the same now remain owing and unpaid to the said W. J. Cooper & Cole Bros.; that said notes were given on an adjustment for material and work furnished and done by the said firm of W. J. Cooper & Cole Bros., to the said C. E. Hanson, between the 1st day of October, 1886, and the 19th day of January, 1887, in pursuance to a written contract between the said firm of W. J. Cooper & Cole Bros. and the said C. E. Hanson; said material was furnished and said work was done in and about the placing of a steam heating plant in a certain house or building situated upon lot No. 371 in the original town of Kearney Junction, Buffalo county, Nebraska, which lot was owned by said C. E. Hanson at the time said contract was entered into and said material furnished and said work done, and the said W. J. Cooper & Cole

Broa. claim a lien upon said premises as security for the payment of said notes."

This was duly signed and sworn to by Cooper and filed in the proper office within the time required by law. The statute authorizes the filing of a copy of the notes given for labor or material used in the construction or repair of a building where there is a contract, expressed or implied, to obtain a mechanic's lien. To obtain the lien it must appear from papers filed in the case for that purpose that the labor or material was furnished in pursuance of a contract, express or implied, for the erection or repair of the building in question. Properly the items should be set out at length on a paper attached to the copy of the notes.

The writer, several years ago, in view of the embarrassment frequently arising from this class of liens, gave a form of a lien based upon a note for labor or material. (Maxw., Practice in Justice's Court [5th Ed.], 565-6.) The affidavit in the case at bar alleges that the goods were furnished in pursuance of a written contract, etc., and that the "material was furnished and said work was done in and about the placing of a steam heating plant in a certain house, etc., owned by C. E. Hanson," etc. This affidavit and the proceedings to obtain a lien are quite informal, but we do not think they are void. The giving of the notes by Hanson was an agreement on his part that the amount expressed therein was due and it does clearly appear from the papers in that case for what purpose the notes were given.

Such lien placed in the proper record of the county within the time required by law is notice to every person of the claim against the land and he cannot shut his eyes to the existence of such claim.

The mechanic's lien law, being remedial in its nature, is to receive a liberal construction, so far as the proceedings to obtain and enforce the lien are concerned.

Of course questions as to the amount due must be deter-

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mined like other questions of fact, and the lien given merely provides a remedy for the collection of the claim. In our view, the lien in this case was sufficient to entitle Cooper & Cole Bros. to relief, and to charge a purchaser with notice.

Moore, therefore, purchased subject to said lien, and is bound thereby. Moore claims that there is no denial in the reply that he was a *bona fide* purchaser, and that therefore the fact is admitted. This is a mistake of fact, however, as Cooper & Cole Bros. in the pleadings claim a lien superior to the rights of Moore, and allege that he purchased subject to their claim. There is no admission therefore, that he was a *bona fide* purchaser.

The following is the contract between Cooper & Cole Bros. and Hanson:

“KEARNEY, NEB., 1/1/'86.

“I hereby authorize and contract with W. J. Cooper & Cole Bros., of Lincoln, Neb., to put in steam heating apparatus in my new store, now building at Kearney, and also in new store building north of mine, as follows:

“To put in radiators in both store rooms and in second story of my building, also to run risers into second story of building adjoining mine on north, said risers to be capped. Marble tops on all radiators on first floor, except in prescription room. Boilers, as also labor as far as I wish, to be furnished by me. Said job to be put in successful operation by the said W. J. Cooper & Cole Bros. I agree to pay frt. on all material shipped, as also a reasonable profit on the whole job; all to be finished as soon as possible. Payment for same to be made by me to the said W. J. Cooper & Cole Bros. *in cash* upon completion, or part payment to be made while in progress, as we may agree.

“Job, as furnished by us [last four words interlined] to be first class in all respects.

(Signed)

“C. E. HANSON.”

It is claimed that the words in quotation, "as furnished by us," to be first class in all respects, being interlined, were inserted after the signing of the contract. Upon this point there is a direct conflict in the evidence, and it is impossible to determine what the exact facts are in regard to it. Where such an interlineation is made before signing, a note to that effect should be made on the margin, and thus all question as to the time when the alteration was made ordinarily would be put to rest. We do not deem the question material in this case, however, as it is evident from all the testimony that the material to be furnished by Cooper & Cole Bros. was to be of good quality. It will be observed that it is provided in the contract that Hanson was to furnish the boilers and "also all labor as far as I wish."

The boiler was furnished by Hanson and seems to have been old and in bad condition, and wholly unfit for the purpose of generating steam for heating the rooms intended.

One R. M. Curtis, a witness called by Cooper & Cole Bros., testified in his direct examination in regard to the boiler and apparatus as follows:

Q. Did you have charge of this heating apparatus at one time?

A. I was running it for a short time.

Q. Did you first take charge of it?

A. No, sir.

Q. How long did it run before you took charge?

A. Three or four days.

Q. State the condition of the building when you first took charge, as to exposures or openings.

A. Where the boiler was it was closed up, but up-stairs the doors were not all closed; they were plastering and finishing up.

Q. Was steam sent into any of those rooms to dry the plastering?

A. Yes, sir.

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Q. State how the thing worked at that time under those trying circumstances.

A. It seemed to work all right at that time; it seemed to take a good deal of coal.

Q. Could you heat the room?

A. Yes, sir, if they would let the radiators alone; the carpenters kept turning them off and on.

Q. When the radiators were let alone how did they work?

A. All right, except one room in the northeast corner, that was where one pipe had a wrong branch.

Q. What had been your business before that time?

A. I had been working for Hanson.

Q. Working at pipe fitting?

A. Yes, sir, some.

Q. State if the apparatus continued to do good work while you remained with it, or if anything happened to cause it to do poor work.

A. Well, nothing happened except in that room one of the pipes froze up and burst.

Q. Was fire kept all night?

A. It was part of the time, and part of the time I staid there until eleven o'clock and would then pack the fire.

Q. Did the boiler leak?

A. Yes, sir.

Q. Did it get worse?

A. Yes, sir.

Q. Any extra pressure put on at any time?

A. Yes, there was one night.

Q. How much water was necessary at first to keep it going twenty-four hours?

A. Three or four pailfuls.

Q. And after this leakage occurred, how much water was required?

A. Well, a good deal more.

Q. How often did you have to put in cold water?

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A. I think I would pump a little about every hour.

Q. What effect would that have on the steam?

A. It would lower the steam.

Q. Did it increase the amount of fuel?

A. Yes, sir.

Q. About how long after you commenced to fire before this leak showed?

A. Perhaps three weeks. It leaked some all the time.

Q. Where was the first leak?

A. In the man-heads.

Q. And where was the leak afterwards?

A. In the flues; it leaked there a little all the time.

Q. You were not able to tell how high the pressure was put on nights when you were not there?

A. No, sir; another man was on at night, or two men; they would change off.

Q. Who brought them there to relieve you?

A. They were sent there by Hanson.

Q. Do you know whether they had any experience or not?

A. I do not.

Q. With a good boiler, would this apparatus have produced good heat in your judgment?

A. I think so; I think this boiler would have worked all right but for the leaking.

Cooper & Cole Bros. merely furnished the pipes, radiators, etc., in other words the conduits by which the steam was carried from the boiler into the several rooms, and to be used in heating such rooms.

So far as appears, these pipes and radiators were adequate for the purpose intended, and seem to have given Hanson satisfaction, or he would not have practically accepted the same and given his notes therefor.

The pipe that had a wrong branch, and, therefore, did not work properly in that room, so far as appears, was placed just as Hanson desired it. By giving his notes for

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the balance due, Hanson, in effect, admitted the correctness of the account and his approval of the work and material. There is considerable complaint in the evidence about the quantity of coal required to heat the rooms in question, but the remedy for that defect lay in procuring a new boiler capable of generating the greatest quantity of steam from the least amount of fuel.

Steam was the agent to be used to heat the rooms in question, and unless this was furnished in sufficient quantity, the pipes to convey the same and the radiators would be comparatively useless, but the blame should not be placed on such pipes and radiators. Suppose the boiler on a locomotive would not generate sufficient steam to propel a train, could the blame be laid on the driving wheels? And would it be sufficient cause on the part of a railway company to refuse to receive and pay for them, that for want for sufficient power they could not be caused to revolve? Or that the power, if sufficient, was produced at too great an expenditure of fuel? No one will so contend, yet it would be as reasonable to charge the failure to produce steam in a locomotive to the driving wheels as to charge the same failure in the heating plant of a house upon the pipes and radiators.

This defense is principally insisted on by the purchaser of the premises. Hanson is brought in because he is the only one that can insist upon the defects complained of; but in an action against him alone, it may well be doubted whether these alleged defects would have been set up, but the defense is unavailing.

The judgment of the district court is reversed, and a judgment will be entered in this court for the amount due on the notes, and to foreclose a lien on the premises.

JUDGMENT ACCORDINGLY.

THE other judges concur.

AMANDA M. SCHUYLER, APPELLANT, V. HENRY O.
HANNA ET AL., APPELLEES.

[FILED JANUARY 28, 1890.]

1. **Appeal: TIME: BILL OF EXCEPTIONS NOT ESSENTIAL.** In order to bring a cause into this court by appeal, the appellant must, within six months from the date of the rendition of the judgment, or decree, or making of the final order appealed from, file with the clerk of this court a certified transcript of the proceedings had in the cause in the court below. It is not essential to jurisdiction that such transcript should contain the depositions, testimony, or proofs offered in evidence in the lower court.
2. ———. The first clause of the syllabus in *Jefferson Co. v. Saxon*, 10 Neb., 14, is modified.
3. ———. A notice of appeal is not necessary to confer jurisdiction.

MOTION to dismiss appeal.

Frank Martin, for the motion.

Isham Reavis, and *E. W. Thomas*, contra.

NORVAL, J.

The plaintiff brought an action in partition in the district court of Richardson county. A decree was entered therein on the 18th day of June, 1888, and the plaintiff appeals. A transcript of the proceedings, containing the pleadings and decree, was filed in this court December 17, 1888. The defendant Lorinda Hanna now moves to dismiss the appeal on two grounds:

First—Because the transcript does not contain the testimony taken on the trial.

Second—That no notice of appeal was issued herein until November 8, 1889.

It is contended that this court has no jurisdiction, because the transcript does not contain the testimony and proofs offered in evidence on the trial. The determination of

28	601
29	132
28	601
33	459
28	601
38	564
38	893
28	601
42	646
28	601
50	399
51	762

this question will turn upon the proper construction of sec. 675, Comp. Stats. 1889, p. 952, which provides that "the party appealing shall, within six months after the date of the rendition of the judgment or decree, or the making of the final order, procure from the clerk of the district court and file in the office of the clerk of the supreme court a certified transcript of the proceedings had in the cause in the district court, containing the pleadings, the judgment or decree rendered, or final order made therein, and all the depositions, testimony, and proofs offered in evidence on the hearing of the cause, and have the said cause properly docketed in the supreme court."

The right to appeal in equity cases is regulated solely by statute. A liberal construction should be given all laws providing for appeals—such a construction as will not abridge the right. The mandatory part of the above quoted statute is "that the party appealing shall within six months after the date of the rendition of the judgment or decree, or the making of the final order, * * * file in the office of the clerk of the supreme court a certified transcript of the proceedings had in the cause in the district court." On the filing of such a transcript within the statutory time, this court acquires jurisdiction, notwithstanding such transcript may be imperfect or may not contain all the matters called for in the above quoted section. The transcript in this case contains the decree of the lower court, and all the pleadings in the case, which we think was sufficient to confer jurisdiction to compel the sending up of the balance of the record, and having jurisdiction for one purpose, it existed for all others.

The decision in *N. & C. R. R. Co. v. Storer*, 22 Neb., 92, we think is decisive of this motion. In that case an appeal had been taken to the district court from the award of commissioners in the assessment of damages sustained by the owner of real estate by the appropriation of the same by the defendant railroad. The transcript consisted

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of a certified copy only of the report of the commissioners appointed by the county judge to assess the damages. It was held that the district court acquired jurisdiction notwithstanding the transcript was not complete. Judge COBB uses this language in the opinion in that case: "It cannot be contended that it is a perfect or complete transcript. Neither can it be said not to be, in part, a transcript of the condemnation proceedings. The condemnation proceedings doubtless consist of the application of the railroad company appellant to the county judge for the condemnation and assessment of damages of its right of way upon and across the lands of appellees, either separately or with others; the precept of the county judge, directing the sheriff to summon commissioners to assess the damages, with the return of the sheriff thereon; and the 'report in writing to the county judge' of the said commissioners of the discharge of the duty for which they were appointed, with the amount of damages as found by them, etc. A perfect and complete transcript would embrace copies of each of these papers. But does not the filing, in the proper office, within the limited time, of a certified transcript, consisting of copies of two, or even but one, of said papers, confer upon the district court jurisdiction to compel the supplying of the missing papers by an order in the nature of a *certiorari* to the county judge? There can be no doubt of it. It follows, then, that that which has been done is not void, it being susceptible of amendment. Proceedings by suggestion of a diminution of the record and application for an order to the county judge in the nature of a *certiorari* to send up the balance of the record were open to the appellee as well as the appellant. It was not necessary that the records should be perfect in order to give the district court jurisdiction; for we have seen, as I think, that it already had jurisdiction for one purpose, and I think that it is of the nature of jurisdiction that if it exists for one purpose it exists for all purposes."

The rule contended for by counsel for the motion would oust this court of jurisdiction of many equity causes brought to this court by appeal, in which no testimony was taken in the lower court, as well as those cases where testimony was introduced, but not brought up, and the decree is sought to be reversed on grounds other than the insufficiency of the evidence.

The case of *Jefferson Co. v. Saxon*, 10 Neb., 14, is cited as sustaining the motion. The question here presented was not in that case. A transcript had been filed in that cause in the supreme court in time. It contained what purported to be a bill of exceptions, but had not been signed by the district judge. The appellant withdrew the records from the files for the purpose of having the bill allowed, and after the time had elapsed for filing an appeal, the record was again filed with the clerk of this court. The appeal was dismissed because "the transcript of the proceedings in the court below was not filed in this court within the time provided by law." The court uses this language in that case: "The voluntary withdrawal of the entire record, leaving nothing of the case in this court, without any saving order as to the defendant's rights under the appeal, and there being no apparent excuse for the delay in obtaining the judge's certificate, was equivalent to a voluntary dismissal by the appellant." It was after this dismissal that the second transcript was filed, which was long after the time had elapsed for filing an appeal. The first point of the syllabus in *Jefferson Co. v. Saxon* is therefore modified.

As to the objection that no notice of appeal was given until November 8, 1889, it is sufficient to say that the statute does not require that a notice shall be given to the adverse party. None is therefore required to give this court jurisdiction.

The motion to dismiss the appeal is overruled.

MOTION OVERRULED.

THE other judges concur.

CHARLES M. PARKER, APPELLANT, V. MARTHA I.
COURTNAY, APPELLEE.

28	606
29	238
28	605
50	813

[FILED JANUARY 28, 1890.]

1. **Decree:** BONA FIDE PURCHASERS UNDER: APPEAL: REVERSAL. Where a district court enters a decree quieting the title to real estate in a party to the action, and such party sells and conveys it to an innocent third person for a valuable consideration, and afterwards, the decree, not having been superseded by bond, is reversed in the appellate court, such purchaser will not be affected by the reversal.
2. ———. The decree of the lower court, *held*, to be contrary to the findings.

APPEAL from the district court for Lancaster county.
Heard below before FIELD, J.

C. M. Parker, and Lamb, Ricketts & Wilson, for appellant:

Bona fide purchasers at a sale under the authority of a judgment not suspended by stay of proceedings, acquire rights which no subsequent reversal can impair. (Freeman, Judgments, secs. 481-4; Code, secs. 82, 588, 677; *Mo-Ausland v. Pundt*, 1 Neb., 211; *Soudder v. Sargent*, 15 Id., 102; *Watson v. Ulbrich*, 18 Id., 186; *McJilton v. Love*, 13 Ill., 486; *Goudy v. Hall*, 36 Id., 313; *Fergus v. Woodworth*, 44 Id., 374; *Feaster v. Fleming*, 56 Id., 457; *Hobson v. Ewan*, 62 Id., 146; *Gossom v. Donaldson*, 18 B. Mon. [Ky.], 230; *Pellersells v. Allen*, 56 Ia., 717; *Thomas v. Nicklas*, 58 Id., 49; *Gott v. Powell*, 41 Mo., 416; *Vogler v. Montgomery*, 54 Id., 577; *Shultz v. Sanders*, 38 N. J. Eq., 154; *Sutton v. Schonwald*, 86 N. Car., 198; *Gibson v. Winslow*, 38 Pa. St., 49; *Jesup v. Bank*, 15 Wis., 604*; *Phillips v. Benson*, 5 South. Rep., 78; *Taylor v. Boyd*, 3 Ohio, 353; *Voorhees v. Bank*, 10 Pet. [U. S.], 1.)

Parker v. Courtney.

The citations of appellee, as to the difference between appeal and error, are not applicable under the Code practice. (Green & Dassler, Pr. & Pl., secs. 1144, 1145; *Arnold v. Baker*, 6 Neb., 134; *Welton v. Bellezore*, 17 Id., 309; *Smith v. Gibson*, 25 Id., 511.)

O. P. Mason, and D. G. Courtney, for appellee :

An appeal is the removal, for review and retrial, of a cause from an inferior to superior court. (*Wiscart v. D' Auchy*, 3 Dall. [U. S.], 321; *U. S. v. Goodwin*, 7 Cranch [U. S.], 110; *Boone v. Chiles*, 10 Pet. [U. S.], 205; *Wetherbee v. Johnson*, 14 Mass., 414; *King v. Sloan*, 1 S. & R. [Pa.], 78; *Moore v. Wait*, 1 Binn. [Pa.], 219; *Owen v. Shelhamer*, 3 Id., 48.) Appeal is of civil law origin, and by it both the law and the facts are reviewed, and the whole case tried *de novo*; error is a common law proceeding to review matters of law only. (*U. S. v. Goodwin*, *supra*.) An appeal generally so far annuls the judgment below that no action can be taken upon it until final decision. (*Archer v. Hart*, 5 Fla., 234; *Danforth v. Carter*, 4 Ia., 230; *Redfield v. Utica & S. R. Co.*, 26 Barb. [N. Y.], 55; *Waterman v. Raymond*, 5 Wis., 185.) As the record of evidence is not before the court the case cannot be reviewed, on error or appeal. The president of the Lancaster County Bank, which was the purchaser in this case, was also attorney for the party against whom the decree was rendered, as well as for appellant, and had actual knowledge of the claims and liens of appellee, and the doctrine of *lis pendens* applies.

NORVAL, J.

This is an appeal from a decree rendered by the district court of Lancaster county dismissing appellant's bill. The suit was brought to quiet the title in the plaintiff to lot three (3), in block ten (10), Lavender's addition to Lincoln.

Parker v. Courtney.

The findings of the court establish the following facts: That in an action pending in the district court of Lancaster county, wherein Martha I. Courtney was plaintiff, and Casper B. Parker and Almira Parker, his wife, were defendants, a decree was rendered April 9, 1885, by said court finding that the said Martha I. Courtney had a lien for the sum of \$76.85 on said lot three (3), in block ten (10), in Lavender's addition to Lincoln, and the defendants therein having paid said sum to the clerk of said court for the use of said Courtney, said lien was by said decree canceled, and the title to said premises was quieted in said Casper B. Parker. Courtney appealed from this decree to the supreme court, but did not file any supersedeas bond. While said cause was pending in the supreme court, the Lancaster County Bank, for a valuable consideration, purchased said premises from the said Casper B. Parker and wife, and afterwards the plaintiff herein, Charles M. Parker, in good faith, for a valuable consideration, purchased said premises from the said bank, and that plaintiff is the present owner of said premises. After the making of said conveyances said cause was reversed by the supreme court, and is now pending in said district court.

The appellee contends that the decree should be affirmed, because the evidence taken in the case in the court below has not been preserved and brought before us. If the appellant was here contending that the findings of the trial court are not supported by the evidence, the position of appellee would be well taken, for the presumption is that the findings are based upon sufficient evidence. Appellant does not claim that the findings are contrary to the evidence, but that the decree is contrary to the findings. In other words, that under the findings, the decree of the lower court should have been for the appellant.

There is but one question for the determination in this case, and that is this: Did the reversal of the decree quiet-

ing the title in Casper B. Parker affect the plaintiff's title to said premises, he having purchased the lot for a valuable consideration and in good faith while the decree was in full force, there having been no supersedeas bond filed?

Section 677 of the Code provides that: "*No appeal in any case in equity, now pending and undetermined or which shall hereafter be brought, shall operate as supersedeas unless the appellant or appellants shall within twenty days after the rendition of such judgment or decree, or the making of such final order, execute to the adverse party a bond with one or more sureties, as follows,*" etc. The provision of section 588 of the Code in respect to supersedeas bond, where a reversal is sought by a proceeding in error, is quite similar to the one above quoted.

It is evident that where no supersedeas bond is filed, the decree remains in full force, and that when a third party purchases property at a judicial sale, or in reliance upon the decree then in force, his rights cannot be divested by a subsequent reversal of the decree.

The case of *Lessee of Taylor v. Boyd*, 3 Ohio, 353, is so much like the one at bar that we quote the following from the opinion in that case: "But the most difficult and important point in the case is as to the effect the reversal is to have upon the rights of third persons legitimately and innocently acquired. After the time limited in the decree itself had transpired, and the decree became an absolute title, the party thus invested with title, and in possession of the land, sold and conveyed it to a third person, who stands before the court as an innocent purchaser for a valuable consideration without notice. Can his rights be divested by a reversal of the decree upon which his title was originally found? We are of the opinion that they cannot be so divested. When James Boyd conveyed to Abraham Boyd, he had a complete title, which it was competent for him to transmit by conveyance in the usual mode. In making this conveyance, he divested himself of title, and

Parker v. Courtney.

invested it in Abraham Boyd, the defendant, who reported himself upon the solemn and final decree of a court of competent jurisdiction, then in full force and of unquestionable validity."

The title to the property was quieted in Casper B. Parker by the decree of the court, he having sold the property for a valuable consideration, to a good faith purchaser, no appeal bond being filed; there can be no doubt upon principle as well as the adjudicated cases, that such purchase is not affected by the subsequent reversal of the decree. (*Voorhees v. Bank*, 10 Peters, 475; *Shultz v. Sanders*, 38 N. J. Eq., 154; *Jesup v. Bank*, 15 Wis., *604; *Feaster v. Fleming*, 56 Ill., 457; *Phillips v. Benson*, 5 Southern Rep. [Ala.], 78.)

We think the principle here involved has already been determined by this court, adversely to the appellee Courtney, in the case of *McAusland v. Pundt*, 1 Neb., 211. The following is the fourth paragraph of the syllabus in that case: "If a party who has recovered a judgment or decree becomes the purchaser of property thereunder, and conveys the same to a third party, and afterwards the judgment and decree, not having been superseded by bond, is reversed in the appellate court, such grantee will retain the property notwithstanding the reversal."

The lower court having held that the plaintiff herein was affected by the pendency of the appeal in the supreme court and the subsequent reversal of the case, it follows that the decree of the district court must be reversed, and a decree will be entered in this court quieting the title to said premises in the appellant.

JUDGMENT ACCORDINGLY.

THE other judges concur.

JOHN MORDHORST V. NEBRASKA TELEPHONE CO.

[FILED JANUARY 28, 1890.]

1. **Pleading: NEW MATTER.** All new matters constituting an entire or partial defense to a cause of action must be pleaded.
2. **The cross-examination of a witness should be confined to the matter covered by the examination in chief.**
3. **Trial: EVIDENCE: ERROR.** When the trial court sustains an objection to a question propounded to a witness on his examination in chief, the party desiring the evidence must offer to prove the facts sought to be elicited by the question in order to predicate error upon such ruling.
4. **The Evidence examined, and held, to sustain the verdict.**

ERROR to the district court for Gage county. Tried below before BROADY, J.

T. D. Cobbe, for plaintiff in error.

Burke & Prout, contra.

NORVAL, J.

This was a suit brought by defendant in error against the plaintiff in error upon a written contract for the rental of a telephone. This contract is made a part of the petition, and contains among other provisions the following:

"In case communication is interrupted from any cause whatever, the only liability of the exchange shall be to abate the rent during such interruption, *after twenty-four hours' written notice thereof to the Exchange.* * * *

"The subscriber requests the Nebraska Telephone Company to place in his premises one set of telephone instruments, as noted on the back hereof, and to connect them for his use with the company's exchange until the first day of January, 1886, and thereafter until this agreement is can-

28	610
32	8
28	610
42	346
28	610
46	830
28	610
46	764
23	610
47	148
28	610
60	554

celed by one month's notice in writing being given from one party to the other, upon the terms and conditions stated above, which he hereby promises to keep and perform, and agrees to pay therefor to said company four dollars on the first day of every month."

The answer is a general denial, and also that the plaintiff did put a telephone instrument in the defendant's place of business, and that after being used a short time became absolutely worthless.

The reply was a general denial. The verdict was for the plaintiff.

It is not claimed that a written notice of defects in the telephone instrument was ever given the company, but it is contended that this provision of the written contract was waived by the company attempting to fix it after verbal complaint. On the trial the court permitted, over plaintiff's objection, the defendant to prove that verbal notice was given, but afterwards this evidence was eliminated from the record, and the jury was instructed not to consider it. This is the first error complained of. We think this ruling of the court correct. Waiver of the written notice contemplated by the written contract was not in issue. In order to prove a waiver of the written notice, it should have been pleaded in the answer, as it constituted new matter of defense. (*Jones v. Seward Co.*, 10 Neb., 154.)

It is contended that the court erred in not allowing the defendant to prove that the telephone instrument was defective. This the defendant attempted to do on cross-examination of some of plaintiff's witnesses, and this objection was properly sustained, for the reason that the witnesses, when examined in chief, did not testify as to the condition of the instrument. Cross-examinations should be confined to matters covered by the examination in chief.

The following question was propounded by the defendant to Mr. Taylor while a witness for the defense: "What kind of an instrument was this as being a good or poor

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instrument?" The plaintiff interposed the objection of immaterial, irrelevant, and incompetent, which objection was sustained by the court, and an exception was taken. The plaintiff in error made no offer of proof. It has been repeatedly held by this court that error cannot be assigned upon the sustaining of an objection to a question propounded to a party's own witness, unless the party desiring the evidence offers to prove the facts sought to be established by the question. (*Mattheos v. State*, 19 Neb., 330; *Yates v. Kinney*, 25 Id., 120.)

Testimony was introduced by the plaintiff in error which tended to show that the telephone instrument failed to work well. Evidence was given by the company tending to establish that the instrument was a good one. The testimony, while somewhat conflicting, sustains the verdict of the jury.

The judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

28	612
49	76
28	612
55	561

SCHUSTER, HINGSTON & Co. v. WASHINGTON I. CARSON.

[FILED JANUARY 28, 1890.]

1. **Stoppage in Transitu.** Where goods are sold on time the vendor cannot claim the right to stop said goods in transit without showing that the vendee is insolvent, and that the goods have not come into his actual or constructive possession.
2. ———. The attachment of such goods while in the possession of the carrier, by a general creditor of the vendee, does not destroy the right of stoppage *in transitu*.
3. **Supreme Court: OBJECTIONS NOT RAISED BELOW.** When there is no answer in the record brought to this court, but it appears that the cause was tried by both parties without objection, as though an answer had been filed denying the allegations of the petition, this court will treat the case in the same way.

ERROR to the district court for Fillmore county. Tried below before MORRIS, J.

Maule & Sloan, for plaintiffs in error, cited: *Hutchinson*, Carriers, sec. 409; 2 *Redfield*, Railways, 132; *O'Neal v. Garrett*, 6 Ia., 480; *Sutro v. Hoile*, 2 Neb., 186; *Steele v. Russell*, 5 Id., 215; *Grimison v. Russell*, 11 Id., 469; *C. B. & Q. R. Co. v. Painter*, 15 Id., 396; *Symms v. Schotten*, 35 Kan., 310 [10 Pac. Rep., 831]; *Rogers v. Thomas*, 20 Conn., 62; *Reynolds v. Boston & M. R. Co.*, 43 N. H., 580; *The Tigress*, 32 L. J. [Eng. Adm.], 101; *Calahan v. Babcock*, 21 Ohio St., 281; 1 Benjamin, Sales, sec. 859.

F. B. Donisthorpe, *contra*, cited: 1 Parsons, Contracts [6th Ed.], pp. 547, 630; Wells, Replevin, sec. 340; *C. B. & Q. R. Co. v. Painter*, 15 Neb., 396.

NORVAL, J.

This is an action in replevin. The case was submitted to the court upon the following statement of facts:

"SCHUSTER, HINGSTON & Co. }
v. }
WASHINGTON I. CARSON. }

"It is hereby agreed and stipulated by and between the parties to the above entitled cause that the same shall be submitted on the following statement of facts: that the plaintiffs are a copartnership doing business at St. Joseph, Missouri; that on the 21st day of September, 1888, they sold to one A. Sands the goods and property which are the subject of this action, for the sum of \$685.50, to be paid for in four months from that date, no part of which sum has ever been paid to plaintiffs; that on the 21st day of September, 1888, the plaintiffs delivered said goods to the Chicago, Burlington & Quincy Railroad, at St. Joseph, Mo., as a common carrier, to convey said goods to the sta-

Schuster v. Carson.

tion at Geneva, Fillmore county, Nebraska, as further evidenced by the original bill of lading issued by the agent of such common carrier, and attached hereto and made a part hereof; that in pursuance of said bill of lading and agreement contained therein, the said C., B. & Q. Railroad conveyed said goods to Geneva station; that on the first day of October, 1888, the defendant herein, as sheriff of Fillmore county, Nebraska, by virtue of an order of attachment, issued by J. D. Hamilton, a justice of the peace in and for Fillmore county, in a suit wherein one Silas B. Camp was plaintiff, and said consignee, A. Sands, was defendant, did levy upon and take possession of said goods while the same were in the possession of the said C., B. & Q. railroad in their freight house at Geneva, Nebraska, and before the same had been delivered by the said railroad to the consignee; that if the court shall find for the plaintiff, from the above agreed statement of facts, that the right of property or right of possession was in the plaintiff, he shall assess the damages at the sum of twenty-five cents; that if the court shall find that the right of possession was in the defendant, then he shall find the value of that possession at \$250, except it shall be found that the defendant had a lien on said property for freight paid; then the value of said possession shall be found at \$3.22, and damages in the sum of twenty-five cents."

The court found for the defendant; the plaintiffs filed a motion for a new trial which was overruled, and they bring the case to this court by a petition in error.

The principal question to be decided in this case is whether the plaintiffs in error had a right, under the agreed facts, to reclaim the goods which they had sold to A. Sands, and which had been attached by the defendant in error, as sheriff, by virtue of a writ of attachment placed in his hands against said A. Sands. The stipulation of the parties shows that the goods in controversy were sold on credit, and were shipped to the vendee by rail,

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and while in the warehouse of the carrier at the point of destination the goods were attached by the sheriff. It is well settled by adjudicated cases that the right of stoppage *in transitu* exists until the goods are delivered to the buyer or possession, actual or constructive, is taken by him. And generally this right is not defeated by the arrival of the goods at the place of destination. (*U. S. W. E. & P. Co. v. Oliver*, 16 Neb., 612; *Greve v. Dunham*, 14 N. W. Rep. [Ia.], 130; Hutchinson on Carriers, sec. 499.)

The fact that the goods were attached by a general creditor of the vendee while the goods are in the warehouse of the carrier at the point of destination, does not destroy the right of stoppage *in transitu*. (*O'Niel v. Garrett*, 6 Iowa, 480; *Rucker v. Donovan*, 13 Kan., 251.)

It will be observed that the stipulation fails to show that the vendee, A. Sands, was insolvent, which we think is decisive of the right of plaintiff in error to stop the goods *in transitu*. (*Walsh v. Blakely*, 9 Pac. Rep. [Mont.], 809; Hutchinson on Carriers, sec. 499; *C., B. & Q. Railroad Company v. Painter* 15 Neb., 396.) The fact that the property was attached is no evidence that the vendee was insolvent. For aught that appears in this record he is abundantly able to pay all legal demands.

It does not appear that an answer was filed in the lower court. The plaintiff in error claims that the allegations of the petition must be taken as true, and that judgment should have been for the plaintiff in error, notwithstanding the stipulation of facts. The cause was submitted to the court to be decided upon an agreed state of facts as though an answer was on file, and no question was raised in that court that one was not filed. This court has held, in the case of the *Western Horse & Cattle Ins. Co. v. Timm*, 23 Neb., 526, "that where a reply was necessary and none made, yet if the cause was tried as though there was a proper reply on file, no advantage could be taken of its absence in this court." The attention of the trial court

Snell v. Ricketts.

was not called to the fact that no answer had been filed. We now think it too late for the plaintiffs in error to complain.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

CORDELIA R. SNELL V. JOHN RICKETTS.

[FILED JANUARY 28, 1890.]

1. **Replevin: RIGHT OF POSSESSION ESSENTIAL.** In order to maintain an action of replevin, the plaintiff must show such an interest in the property claimed as entitles him to its immediate possession.
2. **Landlord and Tenant: LIEN.** Where a tenant agrees to deliver to his landlord, as rent, a specified number of bushels of corn for each acre planted, and there is no agreement that the rent shall be paid out of the corn to be raised by the tenant, *held*, that the landlord has no lien upon the corn raised on the leased premises, and cannot maintain replevin against the tenant for any portion of such corn.

ERROR to the district court for Fillmore county. Tried below before MORRIS, J.

Maule & Sloan, for plaintiff in error.

John Barsby, *contra*.

NORVAL, J.

This is an action of replevin brought by plaintiff in error, to recover possession of 750 bushels of corn claimed as rent due her for the use of sixty acres of land farmed

by the defendant Ricketts in the year 1887. The contract of rental was a written one, and contains this clause: "And the said party of the second part, in consideration of the leasing of the premises as above set forth, covenants and agrees with the party of the first part to pay the said party of the first part, as rent for the same, twelve bushels of corn for each acre of corn planted on said land in the year 1887, said corn to be delivered at the residence of said first party, or at such place in the city of Fairmont as the first party may direct, on or before the 25th day of December, 1887."

The evidence shows that sixty acres were planted to corn, that part of the corn replevied had been gathered and placed in the crib of the defendant Schultz, and the remainder was on the leased premises. No corn having been delivered to plaintiff in payment of the rent, suit was brought October 31, 1887. The findings and judgment of the district court were for the defendants.

It will be seen that the above quoted provision of the lease does not suggest that the plaintiff's rent should be paid from corn raised on the farm by the tenant. Another clause of the lease does provide that a share of the identical oats raised on the place should be delivered to the plaintiff as rent for the ground sowed to that crop. Had Ricketts failed to raise any corn, the plaintiff could have maintained an action against him for the value of the twelve bushels of corn for each acre planted. Under the lease the plaintiff in error had no interest in the corn replevied. Ricketts could have bought good merchantable corn and tendered it to the plaintiff in error before December 25, 1887, and she would have been compelled to have received it. In any view of the case Ricketts had until that date to deliver the corn, and the plaintiff could not maintain replevin prior to the date fixed for the delivery of the corn. To maintain replevin, the plaintiff must show that he is entitled to the *immediate* possession of the property claimed.

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(*Jimmerson v. Green*, 7 Neb., 26; *Haggard v. Wallen*, 6 Id., 271.)

It follows from what has been already said that the trial court did not err in excluding plaintiff's offered testimony. We find no error in the record, and therefore affirm the judgment.

JUDGMENT AFFIRMED.

THE other judges concur.

28	618
29	344
28	618
36	100
28	618
47	609

STATE, EX REL. MARTIN L. EASTERDAY, V. MARTIN
HOWE.

[FILED JANUARY 29, 1890.]

1. **Statutes: CONSTRUCTION.** When statutes are so clearly inconsistent with and repugnant to each other that both cannot be executed, the last in time prevails.
2. **Cities of First Class: JUSTICES OF THE PEACE.** Cities of the first class are entitled to three justices of the peace, one to be elected from each of the three districts by the qualified electors of said district.
3. **Elections: BALLOTS: WORDING.** At an election held in the third district of the city of Lincoln for the election of a justice of the peace therein, ballots were cast designating the office "For justice of the peace for the First district," and others were cast therein "For justice of the peace for the Third district," *held*, that the words describing the district did not constitute a part of the legal designation of the office, and should be treated as surplusage.
4. —: **IMPERFECT CANVASS: MANDAMUS.** Where the board of canvassers of an election have canvassed but a portion of the returns and issued a certificate of election, *mandamus* will lie in a proper case to compel them to reassemble and canvass the returns correctly, and issue a certificate to the one found elected from the whole returns, notwithstanding the person to whom the certificate of election had been issued had qualified and entered upon the discharge of the duties of the office.

ORIGINAL application for *mandamus*.

N. Z. Snell, W. J. Bryan, and A. S. Tibbets, for relator, cited: *State v. Stearns*, 11 Neb., 104; *State v. Wilson*, 24 Id., 139; *State v. Dinsmore*, 5 Id., 145; *Long v. State*, 17 Id., 65; *Coffey v. Edmonds*, 58 Cal., 521; *Inglis v. Shepherd*, 67 Id., 469; *Strong, Petitioner*, 20 Pick. [Mass.], 484; *Dean v. Field*, 5 Cong. El. Cases, 190; 6 Am. & Eng. Encyc. of Law, 344.

Charles L. Hall (Adams, Lansing & Scott, with him), for respondent, cited: *State v. Peacock*, 15 Neb., 443; *State v. Hill*, 20 Id., 119; *Moses, Mandamus*, 150; *Angell & Ames, Corp.* [11th Ed.], sec. 702; *Paine, Elections*, sec. 928; *Ree v. Colchester*, 2 T. R. [Eng.], 260; *St. Louis County Court v. Sparks*, 10 Mo., 117; *State v. Rodman*, 43 Id., 260; *People v. Corporation of N. Y.*, 3 Johns. Cas. [N. Y.], 79; *People v. Supervisors*, 12 Barb. [N. Y.], 222; *Williams v. Com'rs*, 35 Me., 345; *French v. Cowan*, 79 Id., 435; *Howard v. Gage*, 6 Mass., 464; *Clark v. Board*, 126 Ind., 282; *State v. Board*, 49 N. J. L., 349; *People v. Board*, 13 N. E. Rep. [N. Y.], 920; *State v. Deane*, 1 So. Rep. [Fla.], 698; *Ingerson v. Berry*, 14 Ohio St., 325; *Bonner v. State*, 7 Ga., 470.

NORVAL, J.

This is an original application for *mandamus* to compel the respondent, Martin Howe, county clerk of Lancaster county, to reconvene the canvassing board and correctly canvass the returns of the votes cast at the last general election for justice of the peace in the Third district of the city of Lincoln and to issue to relator a certificate of election to said office.

The allegations of the petition are as follows:

"First—That the city of Lincoln is a city of the first class, a municipal corporation organized and existing under

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the general laws of the state of Nebraska, and is divided into six wards, numbered from one to six respectively. For the purpose of election of justices of the peace said city is divided into three districts, numbered from one to three; that the first of said districts is composed of the First and Third wards of said city; that the second of said districts is composed of the Second and Fifth wards of said city; that the third of said districts is composed of the Fourth and Sixth wards of said city; that said Fourth ward is divided into two election districts or voting precincts, designated as 'A' and 'B' respectively; that said Sixth ward is divided into two election districts or voting precincts, designated as 'A' and 'B' respectively.

"Second—That Martin L. Easterday, the relator herein, is a citizen of the United States, a resident of the Sixth ward of said city, and of the Third district as aforesaid, and a legal voter therein, and has been for more than three years last past, and is competent to qualify for the office of justice of the peace.

"Third.—That at a regular annual election held in said city on the fifth day of November, 1889, the said relator was the regular nominee and candidate for justice of the peace in and for said Third district in said city upon the democratic, prohibition, and union labor tickets; that one Charles H. Foxworthy was the regular nominee and candidate upon the republican ticket for the office of justice of the peace in and for the Third district; and there were no other nominees or candidates for the said office in said district, nor were any other persons voted for for justice of the peace of the Third district, nor were there any other candidates for the office of justice of the peace residing in said district.

"Fourth—That by the returns of the judges of election, and the election boards of the various voting precincts in said Third district, made to the county clerk of Lancaster county, the respondent in this case, it was shown that un-

der the head of 'justice of the peace for the Third district,' there were cast in 'A' precinct of the Fourth ward, for M. L. Easterday, the relator herein, 144 votes; for C. H. Foxworthy, 200 votes; that under the head of 'justice of the peace' there were cast in said district for M. L. Easterday, the relator herein, as follows:

'A' precinct, Fourth ward.....	17 votes
'B' precinct, Fourth ward.....	134 votes
'A' precinct, Sixth ward.....	200 votes
'B' precinct, Sixth ward.....	114 votes

"That under the head of 'justice of the peace' there were cast in said district for C. H. Foxworthy as follows:

'A' precinct, Fourth ward.....	None
'B' precinct, Fourth ward.....	200 votes
'A' precinct, Sixth ward.....	137 votes
'B' precinct, Sixth ward.....	68 votes

"That under the head of 'justice of the peace for the First district' there were cast in said Third district for said M. L. Easterday, three votes; for C. H. Foxworthy, none; that the votes cast for M. L. Easterday, the relator herein, and returned for him as follows: 144 votes for 'justice of the peace of the Third district,' 465 votes for 'justice of the peace,' and three votes for 'justice of the peace for the First district'—total, 612, were all cast for the said M. L. Easterday and intended for him and returned for him as 'justice of the peace for the Third district,' and should all be added together as his vote for the said office; that the 200 votes as above set forth returned for C. H. Foxworthy for 'justice of the peace for the Third district,' and the 405 votes returned for said Foxworthy for 'justice of the peace' were voted for, intended for, and returned for said Foxworthy as 'justice of the peace for the Third district,' and should be added together, making a total vote of 605 for him for the office of 'justice of the peace for Third district;' that thereby the said M. L. Easterday received a majority of seven votes, and was duly elected to the office

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of justice of the peace in and for said Third district in the city of Lincoln for the term of two years next ensuing.

"Fifth—That the respondent, Martin Howe, is county clerk for Lancaster county, state of Nebraska, and has been since the 21st day of November, 1889; that it is the duty of the respondent, as county clerk as aforesaid, to call to his aid two electors of the said county and to correctly canvass the votes for justice of the peace for said Third district as returned by the election boards and judges of the various voting precincts of said district, to make all additions and computations necessary to determine which candidate received a majority of the votes cast for said office, to declare the candidate receiving a majority of said votes elected to said office, and to issue to said candidate a certificate of election. The relator, on or about the 6th day of December, 1889, demanded of said respondent, Martin Howe, county clerk of Lancaster county, that he reconvene the canvassing board which canvassed the votes cast in said Third district, and correctly canvass the votes so cast and returned, and add together the votes cast for relator and said C. H. Foxworthy, each, under the various heads of 'justice of the peace for the Third district,' 'justice of the peace,' and 'justice of the peace for the First district,' and declare the said relator duly elected justice of the peace in and for said Third district, and at said time demanded of the said respondent that he issue to him, the relator herein, a certificate of election, as required by law, each and every one of which demands the respondent, Martin Howe, refused to comply with; relator also demanded on said day that the said respondent call to his aid two electors of said county and canvass the votes returned for justice of the peace in said district, at the said election, and add together the votes cast for relator and said C. H. Foxworthy, each, and returned under the various heads of 'justice of the peace of the Third district,' 'justice of the peace,' and 'justice of the peace for the First district,'

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and declare the relator duly elected to the office of the justice of the peace for the Third district, and issue to him a certificate of election according to law; each and every one of which demands the said respondent refused to comply with, and disregarding his duties as above set forth, failed and refused, and still refuses to call to his aid the said electors or reconvene said board, and correctly canvass the votes returned for said office, and declare the said relator elected to said office, and issue to him a certificate of election.

"Sixth—That prior to the 21st day of November, 1889, one O. C. Bell was county clerk of Lancaster county, Nebraska, and contrary to his duties as county clerk, as above set forth, the said O. C. Bell called to his aid two electors of said county and made a pretended canvass of said vote, and in said pretended canvass refused to canvass, count, and add together the 144 votes, the 465 votes, and the 3 votes returned as aforesaid for relator, and refused to declare the said relator duly elected justice of the peace for said Third district, and refused to deliver a certificate of election to said relator; that on or about the 8th day of November, 1889, the relator herein demanded of said O. C. Bell, the then county clerk of Lancaster county, and of the canvassing board by him convened and then in session, that he and they add together all votes cast for relator herein in said Third district and returned as aforesaid under the heads of 'justice of the peace,' 'justice of the peace of the Third district,' and 'justice of the peace of the First district.' Relator also on said day demanded of said O. C. Bell and the said canvassing board that he and they declare him, the relator, duly elected to the office of justice of the peace for the said Third district, and issue to him a certificate of election as justice of the peace for said Third district, but that each and every one of said demands of said relator was disregarded and refused by said O. C. Bell and the said canvassing board, contrary to their duty as afore-

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said; and the said O. C. Bell, county clerk, together with one of said electors, declared the election of C. H. Foxworthy to said office, contrary to their duty, to the facts, the returns, and to the rights of relator, and thereupon the county clerk issued to said Foxworthy a certificate of election to said office."

The answer of the respondent, after admitting the allegations of the petition, contains the following averments:

"That prior to the commencement of this action and after issuance of said certificate, and within the time allowed by law therefor, said Chas. H. Foxworthy did, on the 21st day of November, 1889, execute, in due form of law, and as by law required, his bond as justice of the peace for said Third district, in the sum of \$500 with sureties, as required by law, and presented the same on said 21st day of November, 1889, to the board of county commissioners for approval, as by law required, and did, on said 21st day of November, 1889, take and subscribe the oath of office required by law to be taken and subscribed by a justice of the peace; that afterwards, to-wit, on the 12th day of December, 1889, but prior to the commencement of this action, said bond of said Foxworthy, with said oath of office thereto attached, was duly, as by law required, approved by the board of county commissioners of said county, and thereupon, on the 12th day of December, 1889, was duly filed for record in the office of this respondent county clerk as aforesaid, and duly recorded; whereupon, and prior to the commencement of this action, said Chas. H. Foxworthy duly became the justice of the peace for the Third district of said city, and then and prior to the commencement of this action, said Foxworthy was and still is holding said office.

"This respondent represents and shows to the court that if the peremptory writ of *mandamus* prayed for in said petition issues, and this respondent be commanded to issue a certificate of election to said Easterday for said office, a

cloud will be cast upon the title of said Foxworthy thereto, and the administration of law in said city will be impaired and impeded; that since the election and qualification of said Foxworthy he has provided himself with a suitable office in the Fourth ward of the city of Lincoln, and with the docket provided by law to be kept by justices, and has entered upon the active discharge of duties of justice of the peace as provided by law, and has issued various and numerous summonses in the regular course of his duty and has collected moneys in settlement of suits, and done and performed various other official acts in the discharge of his said duties as such justice as aforesaid.

"This respondent, further answering said petition, represents and shows to the court that, by the law governing cities of the first class, to-wit, chapter 13a, Compiled Statutes 1889, page 157, it is provided in section 11 that in cities of the first class only two justices of the peace shall be elected by the whole city at large; that in sec. 7, chap. 26, Comp. Stats. 1889, page 451, it is provided that said cities shall be, by the county board, divided into three districts, and a justice of the peace be elected from each district; that by reason of the conflict between said laws it was uncertain and not known under which law said election for justice of the peace should be conducted; that, as will be seen from an inspection of the exhibit hereto attached, said Easterday and said Foxworthy had votes returned for each from nearly every voting precinct in the city; that said canvassing board canvassed and tabulated the returns as shown, and by an inspection thereof it will be seen that Foxworthy received over Easterday a majority in the city at large for the office of 'justice of the peace' 592 votes, and in the Fourth and Sixth wards said Foxworthy received over said Easterday a majority of fifty-six votes for the office of 'justice of the peace for the Third district,' and that said canvassing board, by a majority vote, issued the certificate of election accordingly to said Foxworthy.

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"For further and second defense to said petition of said Easterday the respondent avers and says that after said general election, and duly at the time and as by law required, said Bell, county clerk as aforesaid, called to his aid Wm. Gillespie and Lem Tibbitts, two electors of said county, to constitute with said Bell the board to canvass the returns of said election; that said board thereupon duly and as by law required proceeded to canvass and did canvass said returns and count the same in the exact manner in which said returns came from the various election boards of the several precincts of said city and county, and fully and completely discharged the duties devolving upon them by law as a canvassing board, all of which is fully and explicitly shown by the certified abstract of votes in said city at said general election for said office of justice of the peace as returned by said election board, hereto attached and made a part of this answer."

To the answer is attached an abstract of all the votes cast for justice of the peace at said election in the entire city of Lincoln. The cause is submitted on a general demurrer to the answer.

Section 11 of an act entitled "An act to incorporate cities of the first class and regulating their duties, powers, government, and remedies," which took effect March 29, 1889, provides that "every such city shall constitute a district for the election of justices of the peace and constables, and in every such district there shall be elected two justices of the peace and two constables at the time provided by law for the election of such officers in other districts." (Comp. Stats. 1889, page 158, sec. 11.)

On the 30th day of March, 1889, section 7 of chapter 26, entitled "Elections," was amended so as to read as follows: "That in all cities of the first class there shall be but three justices of the peace, and no more, for each of such cities, and for the purpose of establishing this plan it shall be the duty of the county board of the county in

which such city or cities shall be situated, on or before the first day of September, * * * to divide such city into three districts, numbered respectively one (1), two (2), and three (3), and shall be composed of two or more wards or voting districts, as the case may be, comprising compact and contiguous territory, and embracing, as near as may be possible, one-third ($\frac{1}{3}$) of the population of such city, and not subject to alteration oftener than once in four (4) years, and one justice of the peace shall be elected from each of said districts by the qualified electors of said district, who shall provide and maintain an office or place for holding court in the district in which he shall have been elected."

It appears from the allegations of the petition, which are admitted by the answer, that the city of Lincoln is divided into six wards, numbered from one to six respectively; that for the purpose of the election of justices of the peace said city is divided into three districts, numbered from one to three; that the Third district is composed of the Fourth and Sixth wards of said city; that the relator and Mr. Foxworthy reside in said Third district; that votes were cast and returned at said election for relator and Mr. Foxworthy from nearly every voting precinct in the city, and that the said Foxworthy received over Easterday a majority of the votes cast in the city for the office of justice of the peace. It is therefore necessary to determine which of the above quoted acts of the legislature is in force and governed said election. If the act last quoted did not govern, then it is clear the relator was not elected. The first act provides for the election of two justices of the peace and that they shall be elected by the electors of the entire city, while the latter act provides for three justices of the peace to be elected by the electors by districts. These acts are inconsistent with each other, and both cannot be given effect. Under a familiar rule in the construction of statutes which are so clearly inconsistent with and repugnant to each other that both cannot be executed, the last act in

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point of time prevails. (*White v. The City of Lincoln*, 5 Neb., 505; *Brown v. County Commissioners*, 21 Penn. St., 37.) It follows that the act of March 30, 1889, is the prevailing one and that the city of Lincoln is entitled to three justices of the peace, one to be elected from each of three districts by the qualified electors of said district.

The answer states that in the Third district of the city of Lincoln, "For justice of the peace for the Third district" the relator Easterday received 144 votes, and Charles H. Foxworthy received 200 votes; that in said Third district "For justice of the peace," 465 votes were cast for said Easterday, and 405 votes were cast for said Foxworthy, and in said Third district, 3 votes were cast for said Easterday "For justice of the peace for the *First* district." The canvassing board refused to add together and count as votes cast for said Easterday the 144 votes cast for him "For justice of the peace for the Third district," the 465 votes cast for him "For justice of the peace," and the 3 votes cast for him "For justice of the peace for the *First* district." The said board likewise refused to add together and count as votes cast for said Foxworthy the 200 votes cast for him "For justice of the peace for the Third district" and the 405 votes cast for him "For justice of the peace." It is contended that *mandamus* will not lie to compel the counting for relator the three votes cast for him "For justice of the peace of the First district." No doubt these votes would be counted for relator on a hearing in case of contest. (*Coffey v. Edmonds*, 58 Cal., 521; *Inglis v. Shepherd*, 67 Id., 469; *Dean v. Field*, 5 Cong. Election Cases, 190.) While these ballots designated the wrong district, yet being cast in the Third district where relator was a candidate for justice of the peace, they certainly show that the voters intended to vote for the relator for justice of the peace of the district in which they were cast; the words *First district*, did not, as we think, constitute a part of the legal designation of

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the office. They should be treated as surplusage, and these ballots should be counted for relator. It is true the canvassing board act ministerially, yet the performance of ministerial duties often requires the exercise of intelligence, sense, and judgment. It requires no judicial powers to determine the intention of the voters in casting these ballots. The rule governing the canvassing of returns has been stated thus :

“The action of such boards is to be carefully confined to an examination of the papers before them and a determination of the result therefrom in the light of such facts of public notoriety connected with the election as every one takes notice of and which may enable them to apply such ballots as are in any respect imperfect to the proper candidates or officers for which they are intended, provided the intent is sufficiently indicated by the ballot in connection with such facts, so that extraneous evidence is not necessary for this purpose.” (Cooley’s Con. Lim. [5th Ed.], 784.

The next question in the case is this, Should the ballots cast for relator in the Third district of Lincoln “For justice of the peace” be added to those cast for him in said Third district “For justice of the peace for the Third district”? This question has already been practically answered in the affirmative elsewhere in this discussion.

In addition to what has already been stated we will add that we do not think it essential that ballots cast for the office of justice of the peace in the city of Lincoln should designate the district, any more than a ballot cast for a justice of the peace in the country precincts should name the precinct. The law calls these officers “justices of the peace” and a ballot so naming them sufficiently designates the office. The ballots cast in the Third district of the city of Lincoln “For justice of the peace of the Third district” sufficiently designated the office and were legal ballots. It cannot be claimed that either of the designa-

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tions "For justice of the peace" and "For justice of the peace of the Third district" were so vague and uncertain as not to disclose the purpose of the voter. The language used leaves no doubt of the voters' intention. It follows that the votes cast for the relator in the Third district of the city of Lincoln "For justice of the peace," "For justice of the peace for the Third district," and "For justice of the peace for the First district," should be counted for relator and that the votes cast for Mr. Foxworthy in the Third district "For justice of the peace" and "For justice of the peace for the Third district" should also be counted for Mr. Foxworthy.

It is contended that as a certificate of election has been issued to Foxworthy, and he has qualified and entered upon the discharge of the duties of justice of the peace, *mandamus* will not lie to compel the board of canvassers to reassemble and canvass the returns. While the respondent cites a number of authorities sustaining his position, we will follow the rule heretofore adopted by this court, holding that *mandamus* is the proper remedy. (*State, ex rel. Willard, v. Stearns*, 11 Neb., 104; *State, ex rel. Romig, v. Wilson*, 24 Id., 139.)

It is urged that on account of the conflict in the statutes herein quoted, it was uncertain and not known under which law said election should be held, and that votes were returned for Foxworthy and Easterday from nearly every voting precinct in the city. Certainly this does not constitute a defense. The fact that some of the voters did not know which of the above quoted sections of the statute was in force, and improperly cast votes for relator and Foxworthy in the First and Second districts of the city of Lincoln, would be no valid excuse for refusing to count the legal ballots that were cast for them by the voters of the proper district.

In our view, the answer of the respondent fails to state

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facts sufficient to prevent the issuing of the writ, and the demurrer to the answer is therefore sustained.

JUDGMENT ACCORDINGLY.

THE other judges concur.

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[FILED FEBRUARY 4, 1890.]

1. **Fraudulent Conveyances.** H. A. S. applied to K., J. & Co., wholesale dealers at O., to purchase goods, on credit, for the firms of S. & Co. at Neligh, and S. & Co. at Norfolk, and for the purpose of obtaining credit represented "that said firms were composed of his boys; that they were good boys; had some money; that he was behind them and was worth \$25,000." Goods to the amount of \$859.15 were, upon these representations, sold on credit, and shipped, part to S. & Co. at Neligh and part to S. & Co. at Norfolk. About the time the goods shipped to Neligh were received there, a copartnership was formed at that place, in the name and style of Shorey & Co., the only members of which were Mary P. S. and Ella M. S., the wife and daughter of H. A. S., which firm received the said goods in store and proceeded to sell them at retail. The goods shipped to Norfolk were received in store and put on sale at retail by J. L. S. & Co. of that place, a firm of which J. L. S., a son of H. A. S., was the sole member. H. A. S. was, in fact, never a partner in either of said firms and denied his liability. K., J. & Co. sued out an attachment, which on motion of defendants was discharged. On error, *held*, that the transaction was, in law, an assignment and disposition of said goods by the debtor firms, with intent to defraud their creditors.

ERROR to the district court for Antelope county. Tried below before POWERS, J.

Holmes & Hayes, for plaintiffs in error.

Thos. O'Day, *contra*.

COBB, CH. J.

Kirkendall, Jones & Co. held an account not yet due, against the firm of Shorey & Co., upon which they commenced proceedings by attachment in the county court of Antelope county; the ground for attachment set out in the petition being, "that they have sold, conveyed, and disposed of their property with the fraudulent intent to cheat and defraud their creditors, and that defendants were about to convey and dispose of their property with intent to cheat and defraud their creditors." An order in attachment was issued, and property of the defendants therein taken in attachment. The said defendants appeared and presented and filed a motion to discharge the said attachment for the following reasons:

"First—The facts stated in the affidavit are not sufficient to justify the issuing of the same.

"Second—Because the statement of facts in said affidavit is untrue."

The said motion was heard by the court upon affidavits in support and in resistance thereof. And thereupon the court overruled the said motion, to which order the defendants excepted, and preserved the said affidavits by a bill of exceptions. The hearing was had on the 20th and 21st days of February, 1888, and the bill of exceptions settled on the 8th day of March, following. On the 13th day of April, 1888, the defendants filed in the district court of Antelope county a petition in error in said cause, in which they set out and assigned the following errors:

"First—The court erred in overruling plaintiffs' [in error] motion to discharge the attachment.

"Second—The court erred in permitting, over plaintiffs' objection, A. V. Finch to answer the question No. 9 of his direct examination.

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"Third—The court erred in permitting witness Finch, over plaintiffs' objection, to answer the 19th question on his direct examination.

"Fourth—The court erred in overruling plaintiffs' objection to the 20th direct question, and in permitting said witness to answer the same over plaintiffs' objection.

"Fifth—The court erred in overruling plaintiffs' objection to the 24th question put to said witness, and in permitting his answer thereto over objection of plaintiffs.

"Sixth—The court erred in overruling plaintiffs' objection to question of witness H. A. Shorey, and in permitting his answer over the plaintiffs' objection.

"Seventh—The court erred in overruling the objection to questions Nos. 5, 6, 7, and 8 of witness H. A. Shorey, and in permitting answers thereto over plaintiffs' objection. Also in overruling plaintiffs' objections to questions 41, 42, 43, 44, 45, 46, 48, 50, 51, and 52, to said witness, and in permitting his answer thereto over the plaintiffs' objection. Also in permitting, over plaintiffs' objections, Exhibits 1 and 2."

The cause was heard upon error in the district court, which reversed the said order of the county court, and dismissed the said attachment.

Afterwards on the 22d day of ———, 1888, Kirkendall, Jones & Co. presented their motion in said court for a rehearing in said cause, and as the ground thereof alleging that the cause was fully submitted to said court on the 9th day of May, 1888, on the petition in error filed on the 13th day of April, 1888, D. A. Holmes appearing as attorney for the defendants in error; that on the following day, and after the said Holmes had left the county of Antelope, and before said cause was decided, and without notice to the said Holmes, plaintiffs in error filed an amended transcript of the proceedings in the county court, and such transcript now appears of record to be the transcript upon which the final judgment of the court was

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rendered. That the original transcript upon which the cause was submitted does not disclose that the case was passed to final judgment, and the cause was presented upon the theory that it had not proceeded to final judgment in the county court. That the amended transcript discloses the fact that the cause had been finally decided by the county court, and that prior to the filing of the petition in error, an appeal bond had been filed in the county court, and an appeal taken to the district court; that the records of the district court disclose that such appeal was perfected by filing in the district court a transcript of the proceedings and final judgment prior to the commencement of proceedings in error herein; and that such appeal was still pending and undetermined in the district court. That the question as to whether the proceeding in error could be prosecuted after an appeal had been taken, and while the same was pending, from the judgment in this cause rendered by said county court, was not presented by the pleadings nor discussed by counsel at the time the cause was submitted, nor was the same considered by the court, etc. The motion for a rehearing was denied, and the cause is brought to this court by petition in error.

The errors assigned are:

1. The district court erred in reversing the order of the county court.
2. In overruling plaintiffs' motion for a rehearing.

The defendants' motion to discharge the attachment was heard and tried by the county court upon affidavits and oral testimony taken before the court; also, upon a certificate of partnership of Ella M. Shorey and Mary P. Shorey, dated November 10, 1887, of record in the county clerk's office November 12 following, which was offered by defendants, and by which it appears that on September 1, 1887, a copartnership was formed, under the name of Shorey & Co., to continue indefinitely from that date; that the nature of their business was that of a retail store for the

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sale of boots and shoes and hosiery; that the principal place of business was the village of Neligh; that the names and residence of the members of the firm were M. P. Shorey and E. M. Shorey, both at Neligh, and that they are the only members of the firm.

They presented the affidavit of A. V. Finch, that he had been in the employ of Shorey & Co., of Neligh, as salesman in charge of their store since they commenced business; that he has known all the sales made and business transacted from said store since it was started; that the only sales made were those in the usual course of retail trade, and the proceeds, as fast as collected, were deposited in bank for the payment of bills as they fell due.

Also the affidavit of Ella May Shorey, that she is a member of the firm and one of the defendants; that they organized and commenced business as a firm on September 1, 1887, composed of Mary P. Shorey and Ella May Shorey; that it has never had any other members, and no person, company, or body has now, or at any time since the partnership has had, any authority to dispose of any part of the property or goods of the firm, except the clerks employed in the store at Neligh, nor have they now, or at any time have they had, any authority to sell, dispose of, remove, or convey any property of defendants, except that of the goods in the store at Neligh in the usual course of retail trade; that defendants have not at any time sold any part of the property, goods, and merchandise, or otherwise disposed of the whole or any part of their property with the fraudulent intent to cheat or defraud their creditors, or to hinder or delay them in the collection of their debts; that they are not now, nor have been at any time since the formation of their partnership, about to sell, convey, or otherwise dispose of any of their property with any intent to either fraudulently or otherwise defraud their creditors, or to hinder or delay them in the collection of their debts; that the defendants are not now, and have not been at any

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time since said partnership, about to remove the whole or any part of their property, goods, or merchandise with the intent of cheating or defrauding their creditors, or of hindering or delaying them in the collection of their debts, or of removing the whole or any part of their property, so that it could have the effect to cheat or defraud their creditors, or of hindering or delaying them in the collection of their debts; that the only sales, conveyances, dispositions, or contemplated removals, made of any part of their goods or property have been with an absolutely honest intention in the usual course of trade at retail at their regular place of business at their store at Neligh; that the defendant has not at any time authorized any person, partnership, or company to sell, convey, or otherwise dispose of the whole or any part of her property or to remove any part of the same except in the usual course of their retail trade, and for a strictly honest purpose, and that they have at all times applied and been ready to apply the proceeds of such sale to the payment of their debts as they fell due.

Also the affidavit of J. L. Shorey, that he is a member of the firm of J. L. Shorey & Co., of Norfolk, the son of Mary P. Shorey, and the brother of Ella May Shorey, who constitute the firm of Shorey & Co., of Neligh; that neither said firm of Shorey & Co., nor any member of it, has, or has ever had, any interest in the firm of J. L. Shorey & Co., and have never been connected with it in any manner; that these two firms are and always have been absolutely distinct from each other, neither firm ever having had any interest in common or participated in the business of each other; that prior to September 1, 1887, there was a negotiation between the parties to said firms for a partnership embracing the business of both, which never reached an agreement, but prior to that date was wholly abandoned; that there is not and never has been at Norfolk any firm of Shorey & Co., the firm there having always been that of J. L. Shorey & Co., and that affiant

was and always had been the sole member of said firm of J. L. Shorey & Co.

Also the affidavit of Mary P. Shorey, stating substantially the same facts as that of Ella May Shorey.

The plaintiffs presented an itemized account, dated Omaha, September 8, 1887, of \$132.70, for boots and shoes sold to the firm of Shorey & Co. at Norfolk, and of like sales to Shorey & Co. at Neligh, of \$424.95; also one of September 17, 1887, to same firm of \$63; and to same firm, of September 23, 1887, of \$146.60; and to the same firm at Norfolk, October 5, 1887, of \$29.90; and one net, of \$59; and one of October 22, 1887, of \$15. These bills are sworn to by Charles A. Coe, a member of the plaintiffs' firm.

Also the affidavit of Freeman P. Kirkendall, that he is the senior member of the plaintiffs' firm; that on the sale of the first bill of goods to Shorey & Co. he had a conversation in his store at Omaha with H. A. Shorey, who purchased the goods; that at the time Chas. A. Coe, the credit man of the firm, was absent, and affiant required the information of Mr. Shorey as to the standing of his firm, who stated that "his boys were in business in Norfolk and in Neligh; that they were good boys, and had some money, and that he himself was behind them and was worth \$25,000;" that no mention was made of any person other than his boys and himself as having any interest in the business; that affiant's firm did not at that time, nor since, sell any goods to Ella M. and Mary P. Shorey, who now claim to own the business at Neligh; nor have they at any time been requested to transfer their accounts to them; nor have the said Ella M. and Mary P. Shorey ever offered to assume the accounts, or intimated to affiant's firm in any manner that they had any interest in the business, but, on the contrary, the communications of plaintiffs' firm, both personally and by letter, have been with the said H. A. Shorey; that the letter submitted as Exhibit A

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was received November 1, 1887, and was the first intimation from H. A. Shorey that he was not a member of either firm; that the goods purchased by him in person at affiant's store were shipped, a portion to Neligh and a portion to Norfolk at his request; that affiant also attaches letters dated November 3 and 10, received by due course of mail, as Exhibits B and C, written by H. A. Shorey concerning the business of said firm.

"EXHIBIT A.

"NELIGH, NEB., Oct. 31, 1887.

"MESSRS. KIRK., JONES & CO.: Yours of the 28th is before me. I think there must be a mistake. My sons, which compose the firm of J. L. Shorey & Co., of Norfolk, have on hand more than a \$1,000 worth of rubbers. They can buy goods, all they want and what they need, without my endorsement. Then my son at Central City said you refused him goods because you sold to Pearsons. And we have and are buying our rubbers for the Neligh store at Morses. I am not a member of either house, only stand ready to advise, and, if need be, to endorse, as it is my purpose for the boys to make a success. As you do not need a financial statement from me for the goods already delivered—which, doubtless, will be paid for in due time, and as I will tell the boys not to ask for further credit, I will not take the trouble to send the statement.

"Resp'y, H. A. SHOREY.

"EXHIBIT B.

"NELIGH, NEB., Nov. 3, 1887.

"MESSRS. K., JONES & CO.: We were no little surprised at the announcement of drawing upon us on a 30 day bill; and I am sorry that the odd lot of boys' boots is causing so much annoyance. The facts are these: I ordered a lot of boys' calf at \$1.75 a pair because they closed out a mixed lot of odd sizes. Then you called my attention to some wo's boots at what you termed a low

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figure, because you wanted to close them out, as you were to change lasts, or something of that kind. I said 2 dozen of different widths for Shorey & Co., $\frac{1}{2}$ dozen for J. L. Shorey & Co. as samples, and 16 pairs of the boys' boots. Not a word was said of *nett*, or 30 days; if there had been I should have dropped them. As I took them in part to help you get rid of them—and we have not sold a pair of the wo's boots. In some ten days after date of bill we received the wo's boots and the 16 pairs of boys' boots which was to have been sent to J. L. S. & Co. They wrote us to know where theirs were. We replied, as some had come to us, probably you were not to send the balance to them. Upon that they ordered elsewhere boys' boots. Then in about three weeks from date of order, J. L. S. & Co. received the goods from you, but the wo's boots charged at \$2.75 and the bill *nett*. I told them you must have made a mistake and they had better try to use them, although they had plenty. But it seems they think different. There was no cause for delay in shipment, as the boys' boots were on the floor and the women's filled up below. Now if you draw upon Shorey & Co., I suppose they will pay it.

"As to J. L. S. & Co., I have nothing to say; they can do their own business. You can depend upon the bills being settled as soon, *at least*, as they are due.

"Resp'y, H. A. SHOREY.

"EXHIBIT C.

"NELIGH, NEB., Nov. 10, 1887.

"MESSRS. K., JONES & Co.: We return your draft unpaid, as we do not recognize the claim of a 30 day bill. Mr. Shorey, who ordered the goods for us, says not a word about their being *nett*, and as it was fully understood that our time was four months. We did not observe any terms on the bills, so, under these circumstances, we decline the draft. If, however, you very much want the money and will make the usual discount we will pay the bill.

"Resp'y, SHOREY & Co."

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The plaintiff also presented the affidavit of Chas. A. Coe, that he was a member of plaintiffs' firm, and is acquainted with the facts of the purchase of the goods by the firm of defendants; that all of the goods so purchased, except some few of small value, were purchased in plaintiffs' store, in Omaha, by Rev. H. A. Shorey, and by him ordered to be forwarded to Neligh and Norfolk, a portion to each; that on September 17, following, affiant had a conversation with H. A. Shorey, in plaintiffs' store in Omaha, in regard to defendants' account with the plaintiffs. At that time he stated to affiant that "the stores owned by Shorey & Co. at Neligh and Norfolk, for both of which he had purchased goods, were conducted by his sons; that he, himself, was interested in the business, and was worth \$25,000. On the strength of which affiant sold him, at that date, and forwarded according to his orders, to Norfolk and Neligh, a portion of the goods which constitute the basis of this action; that said H. A. Shorey is the only person who has at any time bought goods at our house for the firm of Shorey & Co., either at Norfolk or Neligh. Affiant states that he has special charge of the credits in his firm, and has never at any time sold any goods, nor has said firm, to that composed of Ella May Shorey and Mary P. Shorey, and has never been advised, until the reading of the affidavits of Ella M. and Mary P. Shorey, in this case, that they claimed to be persons composing the firm of Shorey & Co. at Neligh, and that they are not now, and never have been, indebted to affiant's firm in any sum whatever; nor has his firm been advised of any transfer by H. A. Shorey and his sons, composing the firm of Shorey & Co., defendants, to the said Ella M. and Mary P. Shorey, of their stock of goods, nor has his firm consented to a transfer of their accounts against Shorey & Co. to said persons, or accepted them as debtors in place of the firm of Shorey & Co. Affiant further says that he had another conversation with H. A. Shorey in the plaintiffs'

store at Omaha, subsequent to September 17, 1887, concerning the business of the firm of Shorey & Co., to the same effect as that stated, and that the goods sold to H. A. Shorey at that time were sold to him in person, upon the faith of his former statement to affiant concerning the business of the firm of Shorey & Co.

Also the affidavit of F. W. McCann, that he is a member of the firm of W. B. Jones & Co., manufacturers of fine shoes at No. 112 Washington street, Chicago; that he is acquainted with the Rev. H. A. Shorey, president of Gates college, in Nebraska; that on November 12, 1887, the said Shorey called at their place of business, in Chicago, and made representations, for the purchase of goods upon credit, and his own responsibility therefor, substantially the same as those alleged to have been made in the affidavits of Kirkendall and Coe, of the plaintiffs' firm.

A. V. Finch, a witness examined by plaintiffs, testified that he resided at Neligh; was a shoemaker by trade, and acquainted with the firm of Shorey & Co. for the past few months; had been, and was still, in their employ as clerk and cobbler, in their store, in Neligh, since September last.

Q. With whom had you a contract for your services?

A. Young Mr. Shorey came into my shop and talked to me about it, and we went to Mr. Shorey's house and talked the matter over, as to wages, with young Mr. Shorey and his father. I went into their employ about a week afterward. Witness assisted young Miss Shorey and young Mr. Shorey, H. F. Shorey, and Ella Shorey, in the store. H. F. Shorey remained until November 1; after that, assisted Miss Ella Shorey. The old gentlemen was not about the store a great deal.

Q. From whom did you receive instructions as to your work, or the management of the business? (Defendants' objections overruled and exception taken.)

A. Miss Shorey directed me as much or more than any

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one else. When the old gentleman was in the store, he was generally busy writing letters—was busy with his business in the college, writing letters at his desk, and paying no attention to the store. Received some instructions from him in regard to trusting out goods.

Q. About the time this suit was commenced who were you at work for?

A. Shorey & Co.

Q. Who composed the firm at that time?

A. I don't know.

Q. You never heard the firm was composed of Mary P. and Ella M. Shorey until after this suit was commenced, did you?

A. I did not.

H. A. Shorey, sworn as a witness for the plaintiffs (over the objections of defendants, and exceptions taken), and testified that Mary P. and Ella M. Shorey composed the firm of Shorey & Co. at Neligh, and that he was not acquainted with the firm of Shorey & Co. doing business at Norfolk.

Q. Do you know J. L. Shorey at Norfolk and the firm of which he is a member?

A. Yes, sir.

Q. Who composes the firm?

A. J. L. Shorey.

Q. Who is the company? (Objected to by defendants.)

A. I don't know.

Q. Were you a member of the firm of Shorey & Co. during the month of September at Norfolk, or Neligh?

A. No, sir.

Q. You bought goods for them both, didn't you? (Objected to by defendants.)

A. I did not.

Q. You selected goods at plaintiffs store in Omaha, and ordered them shipped to both stores, did you not?

A. No, sir, with one exception: I was at plaintiffs' store

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and Shorey & Co. wanted a few boys' calf boots, and I inquired of some party in the store, when my attention was called to a small job-lot of goods that was cheap, and I told them that I merely wanted to select a few goods for Shorey & Co., of Neligh, as the goods were cheap; I didn't know whether J. L. Shorey & Co. at Norfolk could use any goods or not, but that I would take the responsibility of ordering them shipped to them, in order to close out the lot, if they found upon inquiry that the firm of Shorey & Co. was good. I had nothing to do with the firm of J. L. Shorey & Co.

Q. You bought goods for the firm at Neligh?

A. I did.

Q. You ordered all that they got from plaintiffs in this case?

A. No, sir.

Q. Do you know of their purchasing any themselves?

A. I cannot swear that they did.

Q. You visited Kirkendall, Jones & Co., in their store, on several occasions?

A. Yes, sir.

Q. You ordered goods shipped to Norfolk?

A. No, sir, except the time stated.

Q. I will ask you to examine Exhibits A, B, and C, to the affidavit of Messrs. Kirkendall and Coe and state whether or not they are in your handwriting.

A. Yes, sir, they are.

Q. Who furnished the money that was put in this business here of Shorey & Co.?

A. Shorey & Co. did.

Q. What individual furnished the money?

A. The individuals that formed the firm of Shorey & Co.

Q. Didn't you put any money into that business?

A. No, sir.

Q. Do you know of any money being put into that firm by any one; and if so, how much and by whom?

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A. Yes, sir; first, all that is necessary for business; second, by Shorey & Co.

Q. I want an answer to my question; it is how much money, and by whom, do you know of having been put in that business of Shorey & Co.

A. I have answered, I think.

Q. You say you never put any money in the business?

A. I refer to the record.

Q. Do you now say you never put any money into that business?

A. I do as a business.

Q. Has any of your money been used in that business?

A. I decline to answer, or tell what I do with my money.

(To all the above questions the objections of the defendants were overruled and exceptions taken.) Counsel for plaintiffs insisted on the witness being required to answer the last question.

BY THE COURT: The witness need not answer unless he desires.

Q. Did you write the paper Exhibit No. 2?

A. It is my handwriting.

The main question presented by the record, and deemed important to consider is that upon the affidavit for attachment in the county court, and raised by defendants in their motion to discharge the attachment in said court.

It is fairly established, by the evidence, that the goods for which plaintiffs' attachment was brought were sold to the firm or firms of Shorey & Co., of which H. A. Shorey who actually transacted the business of such purchase, represented his sons to be the active members, and himself a silent partner, or as "standing behind them" and worth \$25,000. That H. A. Shorey was a partner, either active or silent, is manifest by his letters to the plaintiffs, subsequent to his purchases, and set forth in Exhibits A, B, and C. It also sufficiently appears that before the bills for the

goods had become due, and before the attachment proceedings, the goods in the store at Neligh had passed from the control of either H. A. Shorey or his son, or any firm of which either would acknowledge himself to be a member. The means by which this transfer of possession, and the apparent ownership of the goods was effected, while possibly not a sale, in the common acceptation was a sale within the meaning of the words, "sold, conveyed, and disposed of their property."

The credit was given to H. A. Shorey on his representations "that the firm was composed of his boys; that they were good boys; had some money; that he himself was behind them and was worth \$25,000."

For the purposes of this case these representations must be taken as true, when made, and any change of the membership of such firm, before the satisfaction of the debts contracted on account of them, by means of which the whole of the goods passed to the possession of the firm of which the sons of H. A. Shorey were not members, and behind which he no longer stood as surety, must not only be held to be a sale of the goods, but, upon the evidence in the case, must be held to have been made "with the fraudulent intent to defraud, hinder, and delay the creditors of the firm purchasing the goods," and to that conclusion we all come after a thorough examination of the evidence presented.

The questions of practice arising in the record are somewhat complicated and doubtful, but their decision does not affect the main question in this case, and are not deemed important to the present consideration.

The judgment of the district court, adverse to that of the county court, is reversed, and the order, judgment, and ruling of the county court are restored and affirmed, and the attachment originally granted in the cause is restored, and all things reversed, dismissed, vacated, or discharged by the judgment of the district court are restored and affirmed

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and the cause remanded to the district court for further proceedings according to law.

REVERSED AND REMANDED.

THE other judges concur.

L. J. RENO V. D. A. HALE.

[FILED FEBRUARY 4, 1890.]

1. **Alimony: CHARGE ON LAND: FRAUDULENT CONVEYANCES.** In 1880 one Mrs. E. obtained a divorce from her husband and a decree for the conveyance of certain real estate possessed by him. In 1881 the decree for the conveyance of the real estate was vacated and an order made that E. pay Mrs. E. \$1,500. Soon after this modification of the decree, E. conveyed the land to one S. In 1882 an action was instituted by Mrs. E. in the district court against S. to have the conveyance to her declared fraudulent and void, and service was had by publication and a decree afterwards obtained in conformity to the prayer of the petition. There was no appearance by S. or attempt to modify such decree. In 1883, after the taking effect of the act relating to alimony, an execution was duly issued and the land sold to satisfy the decree for alimony, and the sale afterwards confirmed and a deed ordered and made. *Held*, That the purchaser acquired the title of E. to the premises.
2. ——— : ——— : ———. A decree declaring the purchase of the land in controversy fraudulent, having been rendered by a court having jurisdiction of the subject-matter, upon legal service of notice, was valid until set aside or modified.
3. **Judicial Sale: PURCHASE BY APPRAISER.** The statute precludes an appraiser of real estate, which real estate is about to be sold under an execution or order of sale, from purchasing at the sale, and a sale to such appraisers, or either of them, is void as against the judgment debtor, and all persons who sustain an injury thereby. Third persons who have no interest in the matter, however, cannot object.

ERROR to the district court for Madison county. Tried below before POWERS, J.

H. C. Brome, for plaintiff in error :

In Nebraska alimony was not a lien on real estate prior to May 21, 1883. (*Swansen v. Swansen*, 12 Neb., 210; *Brotherton v. Brotherton*, 14 Id., 186.) Hence the decree of May 12, 1883, which sought to subject the fee to a lien for alimony, was void, that being the only relief asked for. (*Fithian v. Monks*, 43 Mo., 502; *Wood v. Stanberry*, 21 Ohio St., 142; *Howe v. McGivern*, 25 Wis., 525; *Moore v. Edgefield*, 32 Fed. Rep., 498.) Since no subsequent proceedings based on a void decree are valid, the vendee, at a sale authorized thereby, obtains no title. (Freeman, Judgments, sec. 117; *Campbell v. McCahan*, 41 Ill., 45; *Huls v. Buntin*, 47 Id., 397; *Hargis v. Morse*, 7 Kan., 417; *Roberts v. Stowers*, 7 Bush [Ky.], 295; *Doe v. McDonald*, 27 Miss., 610; *Hollingsworth v. Bagley*, 35 Tex., 345.) Nor can the legislature give such proceedings validity. (*Pryor v. Downey*, 50 Cal., 388; *Lane v. Nelson*, 79 Pa. St., 407; *Griffin v. Cunningham*, 20 Gratt. [Va.], 109; *Maxwell v. Goetcheius*, 29 Am. Rep., 242; Freeman, Void Judicial Sales, sec. 56.) As Ellis testifies that he made the conveyance to Elizabeth G. Clark to prevent the collection of the amount decreed against him as alimony, neither he nor his subsequent grantee can recover title thereto. (*Moseley v. Moseley*, 15 N. Y., 334; *Gregory v. Haworth*, 25 Cal., 653; *Lawton v. Gordon*, 34 Cal., 36; *Blount v. Costen*, 47 Ga., 534; *Prestidge v. Cooper*, 54 Me., 74; *Jones v. Rahilly*, 16 Minn., 320; *Perry v. Calvert*, 22 Mo., 361; *Stevens v. Morse*, 47 N. H., 532; *Vanzant v. Davies*, 6 Ohio St., 52; *Cameron v. Romele*, 53 Tex., 238.) As Hale, an appraiser, was also a purchaser at the sale, the latter is void. (Code, sec. 503.)

Allen, Robinson & Reed, contra:

The jurisdiction of the district court to enter the modified

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decree cannot be questioned (*Ellis v. Ellis*, 13 Neb., 95); and payment thereof may be enforced by the usual means. Alimony has been enforced as a judgment (*Allen v. Allen*, 100 Mass., 373; *Foster v. Foster*, 130 Id., 189); as an ordinary decree (*Blake v. People*, 80 Ill., 11; *Burrows v. Purple*, 107 Mass., 428); by supplementary proceedings (*Barker v. Dayton*, 28 Wis., 367); by execution (*Call v. Call*, 65 Me., 407); as a charge on the land (*O'Callaghan v. O'Callaghan*, 69 Ill., 552; *Russell v. Russell*, 4 G. Greene [Ia.], 26; *Blankenship v. Blankenship*, 19 Kan., 159; *Holmes v. Holmes*, 29 N. J. Eq. 9; *Owar v. Hungerford*, 10 Ohio St., 268; *Stillman v. Stillman*, 7 Baxt. [Tenn.], 169); and by many other methods. The district court as a court of chancery had power to enforce the decree of alimony against the land. (*Barber v. Barber*, 21 How. [U. S.], 582; 2 Bishop on Mar. & Div., secs. 453, 501.) The decree cannot be assailed collaterally as in this case. (*Finch v. Hollinger*, 47 Ia., 176.) Admitting that Hale, the appraiser, is the same party as defendant in error, the subsequent confirmation of the sale disposed of the objections, and it cannot now be raised collaterally. (*McKeighan v. Hopkins*, 14 Neb., 368; *Neligh v. Kene*, 16 Id., 410.)

MAXWELL, J.

This is an action of ejectment by the plaintiff against the defendant in the district court of Madison county to recover the southwest quarter of section 12, town 22, range 3 west of the 6th P. M., in Madison county. An ordinary petition in ejectment was filed by plaintiff. Hale's answer was a general denial. Upon these issues the cause was tried.

To maintain the issue on his part Reno offered in evidence:

First—Patent to William Ellis, dated February 1, 1875.

Second—Warranty deed by William Ellis (single) to

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Elizabeth G. Smith, dated July 27, 1881; consideration named in deed, \$1,000.

Third—Warranty deed by Elizabeth G. Smith and husband to James T. Brown, dated May 9, 1885; consideration stated in deed, \$3,000.

Fourth—Warranty deed from James T. Brown and wife to Reno, dated December 3, 1886; consideration, as appears from deed, \$800.

Hale, to maintain the issue on his part, offered in evidence certain records of the district court of Madison county, from which it appears that in 1880 Miranda Ellis, the wife of William Ellis, began divorce proceedings against William Ellis, her husband, in that court, and on the 18th day of September, 1880, a decree was entered in that case ordering the conveyance of the real estate in controversy to Miranda Ellis.

At the May, 1881, term of the district court of Madison county this portion of the decree was vacated, and in lieu thereof William Ellis was required to pay to Miranda Ellis \$1,500 as permanent alimony, the form of the modified decree being "And now on this day, this cause coming on to be heard upon the application of the plaintiff to revise and alter the decree made and entered at the last term of this court in this cause, to-wit, to vacate and set aside that part of said decree requiring the defendant to convey to the plaintiff the real estate mentioned and described in said decree, and to allow the plaintiff a certain sum of alimony in lieu of said real estate; and that said application and petition therefor being in due form of law, and the defendant having been duly and legally notified that said application would be made on the first day of the May, 1881, term of this court, and the court, after hearing the evidence and being fully advised in the premises, grants said application and sustains the motion of the plaintiff herein, and it is therefore ordered, adjudged, and decreed by the court here that the said decree made and

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entered in this cause be revised and altered in this, to-wit, that the same be vacated as to the conveyance by the defendant to the plaintiff of the real estate therein described, they not having complied with any part of the order and decree of this court made and entered at the last term thereof; it is further ordered, adjudged, and decreed by the court here that the defendant pay to the plaintiff in this cause, or to her attorneys, Robertson and Campbell, the sum of \$1,500, and in default of such payment execution issue therefor. The said amount of alimony allowed by this decree being in lieu of the said real estate."

From the modified decree Wm. Ellis appealed to this court, and at the July, 1882, term, this court affirmed the modified decree. (13 Neb., 91.)

December 5, 1882, Miranda Ellis commenced an action against William Ellis, Elizabeth G. Smith, and J. L. Haines, alleging that this decree for a permanent alimony was a lien on these premises; that the conveyance to Elizabeth G. Smith was fraudulent, and made to prevent the sale of said real estate by legal process to pay the \$1,500 permanent alimony.

The only service had upon Wm. Ellis and Elizabeth G. Smith was by publication.

May 12, 1883, a decree was entered in that action in accordance with the allegations of the petition, upon default of all defendants except Haines, who had a lease-hold interest only, and ordering the premises sold upon an order of sale, and the proceeds applied in satisfaction of the supposed lien for alimony. July 17, 1883, under this decree an order of sale was issued, and on the 10th day of September, 1883, the land was sold to the defendant, D. A. Hale, who, it is claimed, was one of the appraisers called by the sheriff to make the appraisal upon which the judicial sale was had. In pursuance of this sale a deed was made on the 5th day of December, 1885, by the sheriff to the defendant D. A. Hale.

Defendant also offered in evidence a quit-claim deed to himself from Wm. Ellis, dated September 23, 1887.

It was further shown on the part of defendant, over the objection and exception of plaintiff, by Wm. Ellis, who was called as a witness on the part of defendant, that he, Ellis, made the deed to Elizabeth G. Smith, for the purpose of preventing a sale of the land to pay the alimony awarded to his wife.

Defendant's counsel, W. V. Allen, also testified, over the objection and exception of plaintiff, that when the deed was made by Elizabeth G. Clark to James T. Brown, he was a partner of Brown's, and that he *heard* Brown say that he only paid \$50 for the land. It was further agreed that W. M. Robertson, who acknowledged the sheriff's deed as notary public, and whose name appears thereon as the only witness thereto, was one of the attorneys for plaintiff in the legal proceedings culminating in this deed.

At the close of the evidence, plaintiff asked an instruction directing the jury to return a verdict for plaintiff; this was refused, and the jury instructed to return a verdict for defendant, which was done.

A motion for a new trial was overruled, and Reno brings the case to this court by petition in error.

The validity of the decree declaring the purchase of the land in question by Mrs. Smith from Ellis to have been fraudulent, and declaring such land subject to her alimony, is questioned.

It is true the service was constructive, but the land was within the jurisdiction of the court and subject to its decrees in a proper case. If in fact the land was conveyed by Ellis to Mrs. Smith for the purpose of defrauding Mrs. Ellis of her alimony and the grantee was cognizant of that fact, or took the title without consideration, she would not be protected.

It is the *bona fide* purchaser that is protected, and the testimony tends to show that Mrs. Smith was not such purchaser.

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If the decree against Mrs. Smith was valid, then her conveyance to James T. Brown was of no effect, because if by the decree she was divested of title or interest in the land, then she could convey no title by her deed.

The court had authority to make the decree in question, and as no attempt so far as appears has ever been made to set it aside or modify it, it is still in full force.

This disposes of the title on which the plaintiff in error relies for a recovery, and as his grantor had no title he therefore possesses none. The claim that Hale was one of the appraisers of the land and therefore was precluded from purchasing the same is not available to a third party, who could sustain no injury by such appraisal. The statute, in order to prevent property from being appraised at less than its value, debars the appraisers from purchasing at the sale. At such sale the property must bring at least two-thirds of the appraised value, and as against a person who sustains loss thereby, a sale to one of the appraisers is void. In other words, when brought to the attention of the court in a proper manner, either before confirmation of the sale, or, if there is a valid excuse for not bringing it to the attention of the court then, within a reasonable time thereafter, the court will set the sale aside upon such terms as may be just.

The parties interested may, however, be perfectly satisfied with the appraisal and sale, and if they do not object, third parties who have sustained no injury by the appraisal cannot. In other words, a sale to an appraiser is void as against the judgment debtor and his grantees and may be attacked by them in an action to redeem, even after confirmation. (*McKeighan v. Hopkins*, 19 Neb., 34.)

Whether the right to redeem is open to the plaintiff in error is not now before the court, as the question does not arise in this case. The proceedings under which the defendant in error obtained title by a sale of the land, appear to be regular and need not be further considered.

It is unnecessary to discuss the other questions in the case.

There is no material error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

INSURANCE COMPANY OF NORTH AMERICA v. MC-
LIMANS & COYLE.

[FILED FEBRUARY 4, 1890.]

1. **Insurance: LEX LOCI: ACTION: WHERE BROUGHT.** A contract of fire insurance made in Iowa, the statutes of which state provide in which counties an action may be brought on the policy, does not limit the right to bring an action for loss of the property to that state. The action is transitory in its nature and may be brought wherever service may be had on the company.
2. ———: ———: ———. Section 55 of the Code, which authorizes the bringing of an action against an insurance company in any county where the cause of action or some part thereof arose, is remedial, and not restrictive in its nature; that is, the action may be brought where the cause of action or some part thereof arose, although the company has no agent in that county.
3. ———: **AGENT: SERVICE ON.** Service of notice and proof of loss on a general agent of the insurance company is service on the company.
4. ———. *Held*, That the proof sustains the verdict and that there was no error in the record.

ERROR to the district court for Madison county. Tried below before NORRIS, J.

R. W. Barger, and *Allen & Robinson*, for plaintiff in error:

28	653
28	848
28	632
55	120
28	652
62	782
62	803

The policy was an Iowa contract, and the laws of that state are as much a part of the policy as though printed on its face. The Nebraska statutes do not give the district court of Madison county jurisdiction, as the summons was served only on the local special agent of the company. (*State Ins. Co. v. Granger*, 62 Ia., 272.) Since the service was had upon one not shown to have been a "managing agent" as required by sec. 914 of the Code, the burden was on defendant in error to prove the character of the agency. (*Dickinson County v. Miss. Valley Ins. Co.*, 41 Ia., 286; *Hollis v. State Ins. Co.*, 65 Id., 451.) Delivery of proofs of loss to the local agent was insufficient; they should have been forwarded to the home office. (*Bush v. Westchester F. Ins. Co.*, 63 N. Y., 531; *Lohnes v. Ins. Co.*, 121 Mass., 439; 2 Wood, Fire Ins., sec. 420.) The term state agent, which is all Alverson is shown to have been, implies no grant of authority. (*Farmers Bank v. McKee*, 2 Pa. St., 318; *Dabney v. Stevens*, 2 Sweeney [N. Y.], 424; *Adriance v. Roone*, 52 Barb. [N. Y.], 411; Taylor, Private Corporations, sec. 236; Binmore, Corporators' Manual, sec. 189.) Under the Iowa liquor law, the building was being used for illegal purposes and any contract for its protection would have been contrary to law and void. (*Kelley v. Worcester Mut. F. Ins. Co.*, 97 Mass., 284; *Kelley v. Home Ins. Co.*, Id., 288; *Campbell v. Charter Oak F. & M. Ins. Co.*, 10 Allen [Mass.], 213; *Johnson v. Union M. & F. Ins. Co.*, 9 Ins. Law Journal, 86.)

Brome, White & Mapes, contra :

The question of jurisdiction was eliminated from this case by a general appearance. (*Crowell v. Galloway* 3 Neb., 219; *Kane v. People*, 4 Id., 513; *Burnham v. Doolittle*, 14 Id., 215; *Thraillkill v. Daily*, 16 Id., 116.) The agent who was entrusted with the policies signed in blank, was fully authorized to waive all conditions of the policy, and none of its provisions as to waiver could limit such authority. (*Pit-*

ney v. Glens Falls Ins. Co., 61 Barb. [N. Y.], 335; *Sheldon v. Atl. Ins. Co.*, 26 N. Y., 460; *Bodine v. Exchange F. Ins. Co.*, 51 Id., 117; *Mersereau v. Phoenix M. L. Ins. Co.*, 66 N. Y., 274; *Carroll v. Charter Oak Ins. Co.*, 10 Abb. Pr. N. S. [N. Y.] 166; *Williams v. Hartford Ins. Co.*, 54 Cal., 442; *Young v. Hartford Ins. Co.*, 45 Ia., 877; *Alman v. Phoenix Ins. Co.*, 27 Id., 203; *Franklin Ins. Co. v. Chicago Ice Co.*, 36 Md., 102; *Ins. Co. v. Wilkinson*, 13 Wall. [U. S.], 222; *Ins. Co. v. Colt*, 20 Id., 560; *Ins. Co. v. Wolff*, 95 U. S., 326.) The company was fully informed as to all purposes for which the building was used at the time of issuing the policy and the defense of illegal use is not available.

MAXWELL, J.

This is a proceeding in error to reverse the judgment of the district court of Madison county.

It appears from the record that on the 23d day of February, 1886, the Insurance Company of North America, plaintiff in error, issued to McLimans & Coyle its policy of insurance against fire upon their two-story frame store building, located on lot 7, block 54, in the town of Ogden, state of Iowa, the policy to continue in force for one year from the date of said policy. On the 12th day of February, 1887, a fire occurred which destroyed said building.

On the 7th day of April, 1887, the plaintiffs delivered to H. C. Alverson, general agent of the company, at his office in the city of Des Moines, Iowa, an affidavit for proof of loss.

No proof of loss was ever delivered to the defendant at its home office, nor at the office of its general agent in Erie, Penn.

This action was commenced upon the 16th day of September, 1887, in the district court of Madison county, Nebraska, and on the 16th day of April, 1888, the plaintiffs recovered judgment in said court against the defendant for \$628 and costs.

The petition states "that at the time said policy was issued, and at the time of said fire, plaintiffs were the owners of the property insured; that they paid the premium for the policy, a copy of which is attached to the petition as 'Exhibit A'; that they performed all the conditions thereof on their part to be performed; that on the 12th day of February, 1887, said property was destroyed by fire; that on the 4th day of April, 1887, the plaintiffs gave defendant notice of said loss, accompanied by an affidavit as to how the loss occurred, and the extent thereof, and that no part of said loss has been paid, and they ask judgment for \$600, with interest from the 12th day of February, 1887."

On the 31st day of December, 1887, the defendant, appearing specially and as a friend of the court, filed objections to the jurisdiction of the court, stating:

"First—That the contract of insurance herein sued on was made in Boone county, in the state of Iowa, and covered only property situated in said county, and the loss of the property therein described and insured occurred in said county, and said policy was performable only in said county, and at the home office of said insurance company in the city of Philadelphia, Pa.

"Second—That the cause of action sued on in this cause did not arise in Madison county, Nebraska, but in Boone county, Iowa.

"Third—That the cause of action herein sued on did not arise or grow out of the business or agency of any managing agent or other agent in the state of Nebraska.

"Fourth—That the loss herein sued for did not occur in the state of Nebraska.

"Fifth—That the summons in this case was served on D. T. Graham, an agent of defendant, residing in Madison county, Nebraska.

"Sixth—That said Graham did not receive the application for the policy in suit, nor did he issue or countersign said

policy or have anything to do with the adjustment of said loss, nor did the loss or claim therefor arise out of or have any connection with the office or agency of said Graham.

"Seventh—That section 2584 of chapter 6 of title 17 of said Code of Iowa was at the time said contract of insurance was made and all times since, and now is, the law of Iowa, and part of the contract herein sued on."

The motion to dismiss was overruled, which is now assigned for error. The motion was properly overruled.

A contract of insurance is personal in its nature, and action may be brought wherever service may be had upon the insurer. The laws of Iowa are merely for the regulation of the bringing of suits in that state. They have no extra-territorial effect to limit the bringing of the action in another jurisdiction. Neither do the statutes of this state prohibit the bringing of an action against the company here. Sec. 55 of the Code provides that "An action other than one of those mentioned in the first three sections of this title, against a corporation created by the laws of this state, may be brought in the county in which it is situated, or has its principal office or place of business; but if such corporation be an insurance company, the action may be brought in the county where the cause of action, or some part thereof, arose." This section gives a party aggrieved authority to bring an action against an insurance company in any county where the cause of action, or some part thereof, arose; that is, the action may be brought in the county where the cause of action, or some part thereof, arose, whether there is an agency of the company in that county or not. The section is remedial in its nature and not restrictive. The action therefore was properly brought in Madison county.

Considerable stress is laid on the fact that the proof of loss was served on the general agent of the insurance company instead of on the company itself. But this objection is untenable. While proof of loss must be furnished, all

that the law requires is a substantial compliance with that provision.

A party who in good faith has insured his property and paid the premium demanded for that purpose, may reasonably expect that the insurer will also act in good faith, and upon receiving notice and proof of the loss promptly adjust and pay the same. Technical objections ought not to be sustained to defeat the right, and a general agent who has the general supervision of the affairs of the company in a state, so far represents the insurer that notice and proof of loss served upon him will be sufficient.

The insurance company answer the plaintiffs' petition, and among other defenses are the allegations that the building was vacant, and that it was used for an unlawful purpose, viz., the unlawful sale of intoxicating liquors.

The testimony tends to show that the plaintiffs below resided at Norfolk, in this state, while the agent of the insurance company, through whom the insurance was effected, resided at Ogden, Iowa, and near the property in question and seems to have known the facts in relation to the situation of the building and made no objection.

To what extent the company would be bound by his knowledge it is unnecessary to determine, as the questions of fact seem to have been fairly submitted to the jury.

The following letters, duly signed by the attorney in Iowa, of the insurance company, were introduced in evidence:

"DES MOINES, IOWA, May 2, '87.

"*Mess. McLimans & Coyle, Norfolk, Madison County, Neb.*: GENTLEMEN—Your items of April 19th to H. C. Alverson, and of same date to C. W. Fracker, relating to your claims against Ins. Co. of North America and Springfield Fire and Marine Ins. Co., have been received and handed to me, with other papers, and I have the same under consideration.

"It seems there is some doubt as to whether the compa-

nies are liable, and as present advised, they do not desire to either admit or deny liability, but rather to stand squarely upon their contracts, waiving none of their legal rights in the premises," etc.

"DES MOINES, IOWA, 6/6/'87.

"*Messrs. McLimans & Coyle, Norfolk, Madison County, Neb.*: GENTLEMEN—Your letter of May 5th was duly received and would have been answered ere this except for some rush of business and protracted absence from home. In your letter you say: 'You did not say on what grounds Ins. Co. refuse payments of our loss.' Of course I did not say on what grounds payment was refused, because I did not say that the companies refused to pay, and I do not wish to be understood now as saying that they will or will not pay. It seems, however, that the building, under the prohibitory law of Iowa, was being used for 'unlawful purpose' and that the building, just prior to the loss, became and was vacant and unoccupied. By reference to your policies you will observe that these two facts would render the policies void. There may be other facts which have not yet come to our knowledge which would operate in the same way. We therefore say that while we do not either admit or deny liability, that we will stand squarely on the contracts, waiving none of our legal rights in the premises."

We do not care to comment on these letters. In effect they say we know of no sufficient reason why we should not pay the loss, but nevertheless we will not do so unless compelled. The true rule would seem to be that the company should adjust and pay its losses promptly, unless there are just reasons for its refusal. What such grounds are it is unnecessary to inquire as they were not proved in this case.

There is no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

28	600
38	141

MARY A. HAYLEN V. MISSOURI PAC. R. CO.

[FILED FEBRUARY 4, 1890.]

SUMMONS: WAIVER: ORAL AGREEMENTS NOT ENFORCEABLE.

Oral agreements of attorneys in regard to a case—as that the attorney for the defendant will waive the issuing and service of a summons in error—if made out of court will not be enforced, as they lack the certainty necessary to justify action thereon by the court, while agreements, if made publicly in open court, or in writing duly signed, will be sustained.

MOTION to dismiss.

A. R. Talbot, and *B. P. Waggoner*, for the motion.

Hamilton & Trevitt, *Joseph Wurzburg*, and *G. M. Lambertson*, *contra*.

MAXWELL, J.

This case is submitted on a motion to dismiss because no summons in error was issued within one year from the rendition of the judgment and served on the defendant.

The record shows that final judgment was rendered June 28, 1888. On the 22d of November, 1888, the transcript was filed in this court but no summons in error was demanded or issued.

The attorney for the plaintiff in error in resisting the motion files an affidavit to the effect that he had an oral agreement with the attorney for the defendant to waive service of summons in error, and for that reason no summons was issued. The attorney for the defendant also files an affidavit in which he admits that he agreed to waive service if the case was presented to him for that purpose within one year from the time the judgment was rendered, but that he never agreed and in fact had no authority to waive service

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after the expiration of the year. This court has repeatedly held that oral agreements of attorneys in regard to a case if made out of court would not be enforced, because of the want of certainty in regard to them, while oral agreements publicly made in open court, or agreements in writing duly signed, will be.

This, of course, only applies where the matter agreed upon is within the scope of the authority of the parties to the agreement, but the cases where the authority will be exceeded probably will not be numerous.

The alleged agreement in this case being oral and made out of court, it cannot be enforced. The motion must therefore be sustained.

MOTION SUSTAINED.

THE other judges concur.

D. KEMP v. WESTERN UNION TELEGRAPH CO.

[FILED FEBRUARY 4, 1890.]

1. **Telegraphs: INCORRECT MESSAGES: LIABILITY.** One P. delivered a message to a telegraph company at its office at Papillion, in this state, to be delivered to a person named at Kansas City, Mo. The message as transmitted was incorrect, whereby P. lost a promised situation and sustained damages. *Held*, That the company was liable for the damages.
2. ———: ———: ———: **STATUTE CONSTRUED.** Sec. 12 of the act relating to telegraph companies makes such company "liable for the non-delivery of dispatches entrusted to its care and for all mistakes in transmitting messages made by any person in its employ," etc., and provides that it shall not be exempted from any such liability by reason of any "clause, condition, or agreement contained in its printed blanks."
3. ———: ———: ———: ———. Such requirements are reasonable, and are binding on all telegraph companies in the state.

28	661
32	730
28	661
44	196
28	661
56	418
56	419

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4. ———: INTERSTATE MESSAGES. Where a telegraph company undertakes to transmit a message correctly to another state and fails to do so, it is liable for a breach of its contract, and the party injured may recover all the damages which he sustains by reason of such breach.

ERROR to the district court for Madison county. Tried below before POWERS, J.

William V. Allen, and *John S. Robinson*, for plaintiff in error:

Sec. 12, ch. 89a, Comp. Stats., does not seek to regulate the business of telegraph companies; it simply makes them liable for mistakes in transmitting messages, and does not conflict with the interstate commerce clause of the federal constitution. (*Fuller v. R. Co.*, 31 Ia., 205; 17 Wall., 560; *Johnson v. C. & P. Elevator Co.*, 7 S. C. Rep., 254; *Pembina, etc., Co. v. Pennsylvania Co.*, 8 Id., 737; *Smith v. Alabama*, Id., 564; *Morgan's R. & S. Co. v. Louisiana Bk.*, 30 Coop. Ed. U. S. Rep., 237; *Chicago & N. W. R. Co. v. McLaughlin*, Id., 477; *Dow v. Bidleman*, 31 Id., 841; *Atty. Gen. v. Tel. Co.*, 33 Fed. Rep., 129; *Train v. Boston Disinfecting Co.*, 11 N. E. Rep., 929; *Mo. Pac. R. Co. v. Finley*, 16 Pac. Rep., 951; *Goodrel v. Kreichbaum*, 30 N. W. Rep., 872; *Little Rock, etc., R. Co. v. Hanniford*, 5 S. W. Rep., 294.) A state statute changing the burden of proof in cases of negligence is constitutional (*Augusta & S. R. Co. v. Randall*, 4 S. E. Rep., 674); also, one excluding contributory negligence as a defense (*Quackenbush v. Wis., etc., R. Co.*, 37 N. W. Rep., 834); and one providing that agreements in printed blanks shall be null and void (*Hart v. C. & N. W. R. Co.*, 597).

H. C. Brome, contra:

A state legislature cannot impose the liability contended for with respect to interstate messages. (*Western Union Tel. Co. v. Pendleton*, 7 Sup. Ct. Rep., 1126.) None of the

cases cited by counsel for plaintiff in error are in point, unless it may be certain *dicta*. It is not pretended that plaintiff in error had any contract with Robertson, nor are damages claimed by reason of failure to secure such contract. To recover damages over and above the price of the message, the burden was upon plaintiff in error to prove actual loss of time or money, and this he failed to do. -

MAXWELL, J.

This action was brought by the plaintiff against the defendant in the district court of Madison county to recover damages for the breach of an alleged contract.

It is averred in the petition "That on the 1st day of November, 1886, the said defendant owned, controlled, and operated a line of telegraph wire from Papillion, in the state of Nebraska, to Kansas City, in the state of Missouri, with offices in each of said places in charge of duly authorized agents, at which offices it held itself out to the public to receive and deliver telegraphic messages for hire, and on said date the plaintiff delivered to the defendant at its office in said Papillion for immediate transmission and delivery at Kansas City, Missouri, a message in the words and figures as follows, to-wit:

"Nov. 1st, 1886.

"*To J. C. Robertson, Coates House, Kansas City: Am on my way, Missouri Pacific, Kansas City; arrive eight to-night.*

D. KEMP."

"Which the said defendant then received from the plaintiff, and agreed to promptly and correctly transmit and deliver to the said J. C. Robertson, at the Coates House, Kansas City, Missouri, without delay; that the plaintiff then paid the defendant's duly authorized agent the sum of sixty-five cents for such services, which was accepted by him as full compensation therefor; that at the said time this plaintiff had an engagement to meet said J. C. Robert-

son, the person to whom said message was sent, at the Coates House, Kansas City, Missouri, at the hour of 8 o'clock P. M., on said day, to contract with him as general agent of the Texas Land and Cattle Company, to enter the service of said company on a salary; that if plaintiff made said contract of employment he was compelled to leave said Kansas City that evening at 9 o'clock P. M., to enter upon the discharge of his duties as employe of said company, and if he did not reach said Kansas City by 8 o'clock P. M., said Robertson was at liberty to hire another man for said situation; that said defendant so carelessly and negligently transmitted said message that when it was delivered to said J. C. Robertson, at said Coates House, Kansas City, Missouri, by the defendant, it read that the plaintiff would reach Kansas City at 10 o'clock that night, making plaintiff's arrival there too late to transact said business; that said message was delivered in the condition last above stated, and in consequence of its reading that plaintiff would arrive at Kansas City, Missouri, at 10 o'clock that night, that said J. C. Robertson employed another man for said Texas Land and Cattle Company, and the plaintiff was deprived of said employment, and the profit of said proposed contract; that the plaintiff was entirely without fault or neglect himself; that the plaintiff expended in money in going to and returning from said Kansas City to see said Robertson the sum of \$50, lost six days' time of the value of \$30, and was deprived and prevented from making said contract of employment, all to his damage in the sum of \$200, which said sum is now due the plaintiff from the defendant and wholly unpaid, and plaintiff prays judgment against the said defendant for the sum of \$200, with interest and costs of suit."

To this petition the defendant answered in effect that there was a condition printed on the blanks furnished by it on which to send messages, which provided that the company should not be liable for "mistakes or delays in the

transmission of any unrepeatd message whatever, happening from the negligence of its servants or otherwise, beyond the amount received for the sending of the same," etc., and fixing the liability "for mistakes or delays in the transmission or delivery, or for non-delivery, of any repeated message beyond fifty times the sum received for the transmission of the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines or for errors in cipher or obscure messages," etc. Also that the company will not be liable for damages in any case where the claim is not presented in writing within sixty days after the sending "of the message."

On the trial of the cause the court instructed the jury "that, under the law and the agreed statement of the facts herein, the plaintiff cannot recover beyond the amount paid for sending said message, which it is agreed is the sum of 65 cents." The jury returned a verdict as directed, and a motion for a new trial having been overruled, judgment was entered on the verdict.

The testimony tends to sustain the allegations of the petition.

The point in the answer as to the limitation of time in which to bring the action is not referred to in the brief of either attorney, and, therefore, will not be noticed.

Section 12 of chap. 89a of the Compiled Statutes provides that "Any telegraph company engaged in the transmission of telegraphic dispatches is hereby declared to be liable for the non-delivery of dispatches entrusted to its care, and for all mistakes in transmitting messages made by any person in its employ, and for all damages resulting from a failure to perform any other duty required by law, and any such telegraph company shall not be exempted from any such liability by reason of any clause, condition, or agreement contained in its printed blanks."

The defendant is a corporation existing in this state and

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having offices at various points therein for the transaction of business, and that business is the transmission, for hire, of messages from points within the state to points on its line within or without the state. It is a common carrier of messages, the agent for the transmission of which is electricity. The agent used in the transmission, however, is not material. Suppose the defendant undertook to carry in wagons or other vehicles messages or packages, and under such employment for the plaintiff at Papillion it received the message in question to be delivered at Kansas City, and if it failed to deliver the same it would thereby fail to perform its agreement and would be liable for any damages which the party sending the message might thereby sustain. Why should not the same rule apply where the message is sent by electricity?

The value of a message depends upon its correctness. If it is changed in any material part, it is not the same message as that delivered for transmission and may materially affect the rights of both the person sending it and the person receiving it. Experience has shown that messages can be correctly transmitted from point to point both within and without the state, and where due care is used mistakes can be avoided. The rule seems to be that messages are correctly transmitted.

The legislature of this state, recognizing these facts, in 1883 passed an act in regard to the telegraph companies within the state, the 12th section of which makes the company liable for the non-delivery of dispatches delivered to its care, "and for all mistakes in transmitting messages made by any person in its employ," etc., and declares that it "shall not be exempted from any such liability by reason of any clause, condition, or agreement contained in its printed blanks." This is a reasonable requirement, and as the telegraph company is bound by the law of the state as much so as any inhabitant thereof, the statute in question becomes a part of the contract; that

is, the telegraph company cannot ignore the law and set itself up as superior to it, but must obey it, and transmit messages correctly or be liable for its failure in that respect. This is conceded as to business in the state, but it is claimed that it does not apply to messages transmitted out of the state.

The contract was made at Papillion within this state, and there the defendant undertook to transmit correctly the message to Kansas City. It did not do so. The contract of the defendant therefore was broken, and the plaintiff thereby sustained damages. The place where part of the service was to be performed can make no difference, the contract was made here, and was to be in part performed in this state, and the defendant is liable for the breach thereof.

We are referred to the case of *W. U. T. Co. v. Pendleton*, 7 Sup. Ct. Rept., 1126, as establishing a different rule. In that case the statute of Indiana provided for a penalty of \$100 in certain cases of failure of a telegraph company to perform its duty. A message was transmitted from Indiana to a point in Iowa, and the company there failed to deliver the same. The action was brought to recover the penalty, and the United States supreme court held that it could not be enforced; in other words, that the penal laws of a state do not extend beyond its boundaries, and therefore on the failure of the company to perform its duty in Iowa it did not become liable to the penal laws of Indiana.

The above decision, no doubt, is correct, but it can have no application here. In the case at bar the contract entered into by the defendant to transmit the plaintiff's message correctly, and for which it had received its pay, was broken. He has thereby sustained damages. These damages are the natural result of the breach of the contract, and are not penal in their nature. If recovered, they are merely to compensate the plaintiff for the injury sustained by him from the wrongful act of the defendant. Such damages may be recovered.

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The precise question here involved was recently before the United States circuit court of this state in *Oppenheimer v. W. U. T. Co.*, and Judge Dundy held that the company was liable, and we so hold.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

H. A. SEARLES ET AL. v. ALBERT AVERHOFF.

[FILED FEBRUARY 4, 1890.]

1. **Default: PREMATURE JUDGMENT.** Where a summons, issued by a justice of the peace, is made returnable at 10 o'clock A. M., and the defendant does not appear, the justice, before rendering judgment by default, must wait one hour—till 11 A. M., common time.
2. ———: ———: **TIME: COMMON AND STANDARD.** If standard time is intended, the justice should so designate it in the summons. In the absence of proof to the contrary, the presumption is that common time was intended.

ERROR to the district court for Franklin county. Tried below before GASLIN, J.

H. Whitmore, for plaintiff in error.

E. A. Fletcher, contra.

MAXWELL, J.

This action was brought by the plaintiff against the defendant, before a justice of the peace of Franklin county, upon a promissory note, to recover the sum of \$66.65 and

Searles v. Averhoff.

interest. A summons was duly issued and served on the defendant, requiring him to appear before said justice on December 17, 1887, at 10 o'clock A. M. At the time stated in the return of the summons the plaintiff appeared, but the defendant did not appear. The justice thereupon waited one hour, standard time, and rendered judgment by default against the defendant. Before 11 o'clock A. M., common time, the defendant appeared and asked leave to make his defense to the action, which was refused. He thereupon took the case, on error, to the district court, where the judgment of the justice was reversed and the cause set down for trial.

From that judgment the case is brought into this court by petition in error.

In many of the cities and towns of the state standard time is used in conducting the schools, courts, and public meetings to avoid the annoyance of two systems of measuring time. Standard time, however, in Franklin county, where this case was tried, is about half an hour faster than common time. Whether standard time is generally in use in the courts of that place does not appear. The presumption is that common time is that relied upon when there is nothing to show that a different mode of measuring time has been in general use. Where, therefore, the return of a summons is to be made at an hour named, standard time, the summons should so state; otherwise it will be presumed that common time was intended.

The judgment in this case, therefore, was rendered prematurely, and there was no error in reversing it on that ground. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

ANTON MOLLIE V. MARY PETERS.

28	670
37	811

[FILED FEBRUARY 4, 1890.]

1. **Action Quia Timet: EJECTMENT.** When both parties to a suit by their pleadings claim title to the same tract of land and each asks to have his title quieted, it is too late after decree for the losing party to urge for the first time that the proper remedy was by an action of ejectment.
2. ———. In an action *quia timet*, neither party is entitled to two trials.

ERROR to the district court for Butler county. Tried below before MARSHALL, J.

Matt Miller, and *E. F. Gray*, for plaintiff in error, cited: *Kilgannon v. Jenkinson*, 51 Mich., 240 [16 N. W. Rep., 390]; *Ferguson v. Kumler*, 25 Minn., 183; *Somerville v. Donaldson*, 26 Id., 75 [1 N. W. Rep., 808]; *Schmidt v. Schmidt*, 32 Id., 130 [19 N. W. Rep., 649].

Phelps & Sabin, (*S. H. Steele*, with them), *contra*, cited: *Gregory v. Lancaster County Bank*, 16 Neb., 411.

NORVAL, J.

This is an action in equity brought in the district court of Butler county by the defendant in error against the plaintiff in error to quiet the title to certain real estate in said county.

It appears from the pleadings that the parties own adjoining farms, and this suit grows out of a dispute as to the location of the true line dividing their lands. The strip in dispute is about thirty-six feet wide, and each party claims to be the owner thereof. The decree of the lower court quieted the title in the plaintiff below, and at the

same term of the court the plaintiff in error demanded another trial, which was denied by the court. This ruling is assigned as error and is the only question presented for our decision. It is contended that this is an action for the recovery of real property. If this is true, then it is clear that under section 630 of the Code the plaintiff in error was entitled to two trials.

The petition alleges "that she (the plaintiff) is the absolute owner in her own right of the northeast quarter of section seven (7), in township fifteen (15) north, of range four (4) east of the 6th P. M., in Butler county, and is now in the possession of said land." Further along in the petition it is alleged that the tract in dispute is a part of said northeast quarter, that the defendant has been trespassing thereon and claims to own said strip, and that the defendant has no right thereto. The prayer of the petition is, that the title of said strip of land be quieted in the plaintiff. She does not ask for the possession of said land, nor does the decree in any manner affect the possession. This is not an action of ejectment, but is an action *quia timet*, and the plaintiff in error was not entitled to two trials. (*Harral v. Gray*, 10 Neb., 186.)

Again, the plaintiff in error made no objection to the defendant in error proceeding in equity until after it was found that the decree of the lower court was against him. Each party, by his pleading, claimed to own the strip in controversy. The plaintiff prayed that the title to the same be quieted in her. The prayer of the defendant was, "that a decree be entered that the title be quieted in the defendant, and that all rights of any and whatever character or claim of plaintiff to said strip be forever cut off and barred." Both parties having submitted their claims to the strip in question to the court, asking for equitable relief, it is too late after decree to urge for the first time that the proper remedy was ejectment. (*Gregory v. Lancaster County Bank*, 16 Neb., 411.) It follows that the

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decision of the district court was correct, and is therefore affirmed.

DECREE AFFIRMED.

THE other judges concur.

44-873

**CHARLES H. CARLOW ET AL. V. C. AULTMAN & Co.
ET AL.**

[FILED FEBRUARY 4, 1890.]

1. **Decree: VACATION: GROUNDS.** The district court has no power to vacate or modify its own judgments or orders after the term at which said judgment or order was made, unless there exists at least one of the grounds mentioned in section 602 of the Code. *Held*, That the matters stated at length in the opinion were not sufficient to entitle the plaintiffs in error to a vacation of the decree.
2. **Cross-Petition: NOTICE.** When a defendant in an action files his answer and cross-petition within the time fixed by law, he is not required to give to the other parties to the suit any notice of the filing of such pleading.
3. **Judicial Sale: NOTICE BY PUBLICATION.** Where the first publication notice of a sheriff's sale was made March 16, the last April 13, and the notice was published in every issue of the paper between the date of the first publication and April 16, the day of sale, *held*, sufficient.
4. **Foreign Corporations: TITLE TO REAL ESTATE.** While section 1 of chapter 65 of the Laws of 1887 was in force, C. Aultman & Co., a foreign corporation, purchased real estate in this state at a judicial sale, *held*, that its title is valid against every one but the state, and can be divested only by proceedings brought by the state for that purpose.
5. **Error Proceedings: EQUITY CAUSES: MOTION FOR A NEW TRIAL NECESSARY.** In order to review the proceedings in the trial of an equity cause by a petition in error, a motion for a new trial must be filed as in an action at law.

36 672
33 34
28 672
36 690
36 858
36 866
37 622

36 672
38 568
130 870

28 672
41 54
41 196
41 251
41 254
141 538

28 672
42 47
42 876

28 672
44 361
44 768

28 672
45 335
45 382

28 672
46 208

28 672
48 55
48 453

28 672
51 167
53 412
53 535
54 228
54 296

28 672
56 529

28 672
58 477
158 606

ERROR to the district court for Fillmore county. Tried below before MORRIS, J.

F. B. Donisthorpe, and *Robert Ryan*, for plaintiffs in error, cited: *Rosenfield v. Chada*, 10 Neb., 421; *Lawson v. Gibson*, 18 Id., 137; *Cockle Separator Co. v. Clark*, 23 Id., 702; *Kansas Mfg. Co. v. Gandy*, 10 Id., 83; *State Savings Bank v. Scott*, 11 Id., 448; *Mundy v. Whittemore*, 15 Id., 650; *Schouler, Husband and Wife*, sec. 260, and cases cited in N. 1, p. 307; *Willard, Equity*, 650.

Sawyer & Snell, contra, cited: *Pope v. Hooper*, 6 Neb., 178; *Thompson v. Sharp*, 17 Id., 69; *Wyant v. Tuthill*, Id., 495; *Messenger v. State*, 25 Id., 674; *Simmons Hardware Co. v. Brokaw*, 7 Id., 405; *Hapgood v. Ellis*, 11 Id., 131; *Cockle Separator Co. v. Clark*, 23 Id., 702; *Long v. Clapp*, 15 Id., 417; *Dutcher v. State*, 16 Id., 30; *Boldt v. Budwig*, 19 Id., 739; *Culver v. Judge*, 57 Mich., 80; *Suydam v. Bartle*, 9 Paige [N. Y.], 294, 1 Devlin, Deeds, sec. 127, and cases.

NORVAL, J.

On the 8th day of April, 1886, Frederick Curtis commenced a suit in the district court of Fillmore county, Nebraska, to foreclose a mortgage upon the south half of the southwest quarter of section fourteen (14), township five (5), range three (3) west, given to secure a note in the sum of one hundred and sixty dollars (\$160), executed by Josephine Carlow and Charles H. Carlow. C. S. Cleveland and C. Aultman & Co. were made parties defendant. Personal service was had upon the Carlows, and they were required to answer by the 10th day of May, 1886. Service was made by publication upon C. Aultman & Co., and it was required to answer on or before the 17th day of May, 1886. On that day the company filed its answer

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and cross-petition. The defendant, Charles H. Carlow, filed no pleading, and was duly defaulted. His wife filed an answer, and on the 29th day of May, 1886, the case was heard, and a decree rendered in favor of Frederick Curtis for \$184.12, and the property ordered sold to pay Curtis, and the surplus, if any, was to be paid to the clerk of the court, to abide further orders. At the same time, C. Ault- & Co. were given leave to plead to the answer of Josephine Carlow. On the 3d day of November, 1886, the cause was heard on the demurrer of C. Aultman & Co. to the answer of Josephine Carlow. The court sustained the demurrer, and entered judgment in favor of C. Aultman & Co. for \$536.10, and decreed that, after paying the costs and the amount found due Curtis, then the surplus should be applied to the payment of the amount found due C. Aultman & Co. An order of sale was issued on the 28th day of February, 1887, and on the 16th day of April, 1887, the property was sold to C. Aultman & Co., it bidding it in, in order to protect its lien. On the 31st day of May, 1887, an order was made to show cause by Thursday morning why the sale should not be confirmed. On the 2d day of June the court found that the sale had been conducted in all respects according to law, and it was duly confirmed.

The sale was made under the Curtis decree and not under the one in favor of C. Aultman & Co. On the 1st day of February, 1888, the said Josephine Carlow and Charles H. Carlow filed a petition to have the decree of C. Aultman & Co. vacated, and the order of confirmation and the sheriff's deed set aside. C. Aultman & Co. demurred to this petition, and the demurrer was overruled; but at the same time the cause was submitted upon the pleadings and evidence. The district court denied a rehearing and C. H. Carlow took an exception. The Carlows bring the case to this court on error.

The first objection urged is that the district court had no

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jurisdiction over the person of the defendant, C. H. Carlow, as to the cross-petition of C. Aultman & Co. Personal service was had upon the Carlows, and they were required to answer the petition of the plaintiff below, Curtis, by the 10th day of May, 1886. At the commencement of the action C. Aultman & Co. was made a party defendant. Service was made upon it by publication, and it was required to answer on or before May 17, 1886. On that day the company filed its answer and cross-petition, but no notice was served upon the Carlows of the filing of this cross-bill. When a defendant files his answer and cross-bill within the time fixed by law, he is not required to give any notice to the other parties to the action. Carlow was bound to take notice of the filing of the cross-bill of C. Aultman & Co., and the district court had jurisdiction of the persons of the Carlows. (*Hapgood v. Ellis*, 11 Neb., 131; *Cockle Separator Co. v. Clark*, 23 Id., 702.)

It is claimed that the cross-petition is defective in not alleging "whether any proceedings have been had at law for the recovery of the debt secured by the mortgage." It is necessary that a cross-petition to foreclose a mortgage should contain this allegation. Such omission, however, is not sufficient ground for the district court to vacate its decree after the term at which it was rendered. It does not come under either of the subdivisions of section 602 of the Code.

We are precluded from examining the testimony to see if the decree is supported by the evidence, and also some of the other errors assigned, for the reason that no motion for a new trial was filed in the lower court. Where an equity cause is brought to this court for review, on error, a motion for a new trial should be presented to the district court the same as in an action at law.

Notice of the sheriff's sale was properly given. It was published five consecutive weeks, and thirty days intervened between the time of the first publication and the date of

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the sale. The first publication was made March 16, the last on April 13, and the sale occurred April 16. The notice was published in every issue of the paper between the date of the first publication and the day of sale. As to the appraisement, it is sufficient to say that it was made according to law.

The last contention of the plaintiffs in error is that C. Aultman & Co. was prohibited from acquiring title to the land because it is a non-resident corporation. At the time of the sheriff's sale, section 1 of chapter 65 of the Laws of Nebraska, 1887, was in force and which provides: "That no non-resident, alien foreigner, who has not declared his intentions to become a citizen of the United States, nor any corporation or association not incorporated under the laws of this state, shall acquire or own, hold or possess, by right, title, or descent accruing hereafter, any real estate in the state of Nebraska."

The plaintiffs in error cannot take advantage of this statute. The title of C. Aultman & Co. is valid against everyone but the state, and can be divested only by proceedings brought by the state for that purpose. (*National Bank v. Matthews*, 8 Otto [U. S.], 621; 1 Devlin on Deeds, sec. 127, and cases there cited.)

We are satisfied that all the matters urged by the plaintiffs in error were insufficient to authorize the district court to vacate its decree rendered on the cross-petition of C. Aultman & Co. The order of the district court denying a new trial is affirmed.

ORDER AFFIRMED.

THE other judges concur.

STATE V. COMMERCIAL STATE BANK ET AL.

[FILED FEBRUARY 5, 1890.]

1. **Banks: RECEIVERS: SUPREME COURT MAY APPOINT.** The supreme court in a proper case has jurisdiction to appoint a receiver to take charge of and wind up the affairs of a banking corporation organized under the laws of this state.
2. ———: ———. **THE APPLICATION** for the appointment of a receiver, set out at length in the opinion, *held*, sufficient.
3. ———: **CREDITORS: STOCKHOLDERS.** The property and assets of a banking corporation organized under the laws of this state, after it has ceased to carry on a banking business, are a trust fund for the payment of its debts. The rights of the creditors to the corporate property, so far as it is necessary to meet their demands, are superior to those of the stockholders, or the assignee of an insolvent stockholder.

ORIGINAL application for appointment of receiver.
Filed under provisions of sec. 14, ch. 37, Laws 1889.

William Leese, Attorney General, and W. T. Scott, for the state.

Sedgwick & Power, contra.

No briefs filed.

NORVAL, J.

This is an original application brought by the attorney general for the appointment of a receiver to take charge of and wind up the business of the defendant bank. The petition is as follows:

"The attorney general respectfully represents to the court:

"First—That the defendant the Commercial State Bank is a corporation, duly organized under and by virtue of the laws of this state.

38	677
34	200
28	677
37	181
28	677
40	193
40	219
28	677
459	455

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"Second—That the defendant John F. McConaughy is the president of the defendant bank.

"Third—That the defendant George W. Shreck is the sheriff of York county.

"Fourth—That the following named persons are creditors of said bank, and have money deposited therein in the sums set opposite their respective names :

N. M. Ferguson	\$2000 00
T. J. Maguire.....	650 00
J. H. Bell.....	110 00
E. J. Petty.....	377 35
Fairman & Harrington	300 00
Mabel Fairman.....	100 00
Grace Fairman.....	50 00
E. E. Watts.....	235 00
Daniel Dorenbarger.....	300 00
W. C. Conkle.....	394 13
W. S. Jeffrey	300 00

"That the following named persons have sums of money deposited in said bank which in the aggregate amount to \$2,583.58, to-wit : John W. Atkinson, Ancient Order of United Workman, A. R. Bennett, R. L. Baugh, C. W. Beanblossom, E. B. Fox, S. M. French, Gobe Brothers, T. B. Kohn, S. A. Myers, R. E. McConaughy & Co., George F. Holmes, Scott & Stoddard, W. R. Vandever, J. A. Greer & Co., G. M. Snyder, L. W. Troutman, John Bingham, S. J. Laird, William Bartlett, Thomas Barber, J. A. Vandyke, John Bittinger, C. A. Pyle, W. C. Harris, J. M. Stoddard.

"Fifth—That the defendant McConaughy, on the 25th day of November, 1889, being, as he alleges, insolvent, made an assignment for the benefit of his creditors, and the defendant Shreck, as sheriff of York county, has taken possession of all the estate of the defendant McConaughy, and by the direction of the officers of the defendant bank, who claim that the defendant McConaughy is the sole owner

thereof, the sheriff has closed the doors of said bank, taken possession of all its assets, and claims to hold the same by virtue of his office as assignee of said alleged insolvent.

"Sixth—That at all times since the commencement of business by defendant bank, it has been conducted as a corporation, its articles of incorporation having been duly filed in the office of the county clerk of York county, and a copy thereof in the office of secretary of state.

"Seventh—That it has been made to appear to the auditor of public accounts and the attorney general that the manner in which the defendant is conducting its business is unsafe and unauthorized, and is jeopardizing the interest of its depositors, and that it is unsafe and inexpedient for such corporation to continue to further transact business. Reference is hereby made to the affidavits hereto attached as Exhibits 'G' and 'H,' and the report of said bank made November 8, 1889, marked Exhibit 'A.'

Eighth—That the defendant McConaughy is indebted in much larger amounts than he can pay in full, and has been insolvent for a long period of time, but the assets of said bank are not large enough, together with the individual assets of the defendant McConaughy, to pay more than 50 per cent of the liabilities of the defendant bank and the defendant McConaughy; and the interests of depositors will be without protection unless this court appoint a receiver to wind up the business of the defendant bank.

"Ninth—That if the affairs of said bank are properly managed, and its business wound up in accordance with the law under which it has been conducting a banking business, its depositors and all of its creditors may be paid in full, as its assets are in excess of its liabilities.

"Tenth—That all of the persons whose names are mentioned in the body of this petition as depositors in said bank have made demand upon the officers of said bank for the payment of the amounts severally due them, and payment thereof has been by them refused; that the officers of

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said bank declare that no more payments will be made by the defendant bank ; that the sheriff, who now holds possession of its assets, intends to distribute the same among all of the creditors of the defendant McConaughy *pro rata* only ; and the sheriff now holds possession of said assets, and will so administer said assets unless he be ordered to turn the same over to a receiver to be appointed by this court.

“ Eleventh—That on Saturday, the 23d day of November last, the president of the defendant bank, at the time when he was contemplating insolvency, and knowing that he was insolvent, received from S. J. Laird, one of the depositors above mentioned, a deposit of money amounting to the sum of \$300, knowing that he, the said president, was insolvent and contemplated making an assignment for the benefit of his creditors, and on said day the said defendant issued his check on said bank, which was paid after banking hours on said day, all of which was done in contemplation of insolvency, and with intent to defraud creditors of said bank.

“ Twelfth—The plaintiff therefore prays that the sheriff of said county be ordered to list the assets of the defendant bank, to report the same to this court, and to turn the same over to such person as this court may direct ; that this court will appoint a receiver, who may be by the court ordered and directed to take charge of the assets of the defendant bank, with directions to wind up the affairs of said bank in accordance with law, and for such relief as may be just and equitable ; that the defendant McConaughy may be ordered to show cause, if he has any, why the court may not appoint a receiver as herein prayed for.”

Exhibit “A” attached to and made a part of the petition is the report made by the bank to the auditor of public accounts, of its condition at the close of business on October 30, 1889, in which the liabilities of the bank for “demand certificates of deposit” are set down at \$684.70.

It appears from Exhibit "H" attached to the petition, that on the 6th day of June, 1889, the bank, by McConaughy, its president, issued two demand certificates of deposit for \$1,000 each, to one N. M. Ferguson; that the same are outstanding and unpaid; that the defendant bank, with the intention of deceiving its depositors, failed and refused to include the amount of said certificates in its said bank statement.

To the petition the defendant Shreck demurs upon the following grounds:

First—Because the said petition or complaint does not state facts sufficient to constitute a cause of action against this defendant.

Second—Because this court has no jurisdiction in said cause, as appears from the face of the petition or complaint.

This proceeding was commenced under section 14 of the state banking law, which is as follows:

"Sec. 14. Whenever it shall appear to the auditor of public accounts, state treasurer, and attorney general, or any two (2) of them from any examination or report provided for by this act, that any corporation, firm, or individual transacting a banking business is the owner of property of the kind required by this act, of the cash value of less than the amount herein required, above all incumbrances thereon, and in excess of all liabilities due from said corporation, firm, or individual, or is conducting his or its business in an unsafe and unauthorized manner, and is jeopardizing the interest of his or its depositors, and that it is unsafe and inexpedient for any such corporation, firm, or individual to continue to transact a banking business, they shall communicate the facts to the attorney general, who shall thereupon apply to the supreme court, or the district court of the county where such corporation, firm, or individual has his or its banking office, or to a judge of either, for the appointment of a receiver to take

charge of and wind up such banking business. It shall be sufficient to authorize the appointment of a receiver, on the application of the attorney general, that the facts set forth in this section shall be made to appear."

The first question to be determined is, whether this court has jurisdiction of the case. This is a civil action brought by the attorney general in the name of the state.

Sec. 2 of article 6 of the constitution confers original jurisdiction on the supreme court in civil cases in which the state is a party. The above quoted section of the banking act provides that the application for the appointment of a receiver may be made to this court. We do not hesitate to entertain jurisdiction.

The petition contains all the facts required by the banking law and is sufficient to authorize the appointment of a receiver to take charge of and wind up the affairs of the defendant bank.

It appears from the allegations of the petition that the defendant McConaughy has made an assignment for the benefit of his creditors, and that the defendant sheriff, as such assignee, has taken possession of all of the estate of said McConaughy, by the direction of the officers of the defendant bank, who claimed that the defendant McConaughy is the sole owner thereof. This brings us to the principal question we are called upon to decide in this case, and that is, whether the property and assets of a banking corporation organized under the laws of this state, after it has ceased to do business, should be applied in payment of its debts, and whether this right is superior to those of a stockholder of the bank, or the assignee of a stockholder. The defendant bank is an artificial person, having its own property, assets, and liabilities. Credit was given to the corporation; its assets should be applied where the credit was given, and not be taken in payment of the individual debts of one of the stockholders.

It has been repeatedly held by this court, and we think

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correctly, that the property of an insolvent trading partnership should be applied first in payment of the firm debts. The same rule should be applied in winding up the business of the defendant bank. The property and assets are a trust fund for the payment of its debts and cannot lawfully be diverted. The rights of the creditors to the assets are superior to those of the stockholders or the creditors of a stockholder. Mr. Perry, in his work on trusts, states the rule thus: "A corporation holds its property in trust: first, to pay its creditors, and, second, to distribute to its stockholders *pro rata*. If, therefore, a corporation should dissolve and divide its property among its shareholders without first paying its debts, equity would enforce the claims of its creditors by converting all persons, except *bona fide* purchasers for value, to whom its property had come, into trustees, and would compel them to account for the property, and contribute to the payment of the debts of the corporation, to the extent of its property in their hands." (Perry on Trusts, sec. 242.) This doctrine has been established by the adjudicated cases. In *Upton v. Tribilcock*, 91 U. S., 45, it is stated that "the capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts." The following authorities sustain the same position: *Taylor v. Miami Exporting Co.*, 5 Ohio, 165; *Goodin v. Cincinnati, etc., Canal Co.*, 18 Ohio St., 182; *Sanger v. Upton*, 91 U. S., 56.

It appears from the allegations of the petition that the assignee of McConaughy has, by direction of the officers of the bank, taken possession of all its property. This action on the part of the officers conferred no rights upon the as-

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signee. It being established that the assets of the bank are a trust fund for all its creditors, it follows that the officers of the corporation were trustees for all the creditors and could not lawfully turn over the same to the assignee. The receiver heretofore appointed by this court is entitled to all of the property of the bank.

The demurrer to the petition is overruled.

JUDGMENT ACCORDINGLY.

THE other judges concur.

28	684
37	621
28	684
45	719

SCHUYLER NATIONAL BANK V. NEIL R. BOLLONG.

[FILED FEBRUARY 18, 1890.]

1. **Pleading: WORDS AND PHRASES.** The words "so as aforesaid paid by the plaintiff to the defendant and by the defendant knowingly contracted for and received from the plaintiff" as used in the petition, *held*, neither redundant, scandalous, nor irrelevant matter in the sense of section 125 of the Code.
2. **National Banks: USURY: ACTION: WHERE BROUGHT.** An action may be brought in any county or district court in the county in which a national banking association is located, having jurisdiction of the amount involved, for a penalty under section 5198 of the Revised Statutes of the United States. (See *First National Bank v. Overman*, 22 Neb., 116.)
3. ———: ———: **PLEADING.** A petition containing several causes of action not separately stated and numbered, is not for that reason void; but is susceptible of amendment.
4. ———: ———: ———: **AMENDMENT.** Upon the amendment of a petition, where the identity of the causes of action are preserved, and the claim of plaintiff not substantially changed, no new summons need be issued nor served, and the action will be *held* as commenced at the date of the issuance of the summons in the case.
5. ———: ———: **RECOVERY.** In an action against a national bank-

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ing association, for a penalty under section 5193 of the Revised Statutes of the United States, the plaintiff may recover double the amount of interest actually paid, and is not confined to double the amount of usury paid.

ERROR to the district court for Colfax county. Tried below before MARSHALL, J.

E. T. Hodson, for plaintiff in error, cited, as to the second assignment: *Tiffany v. Nat. Bank*, 18 Wall. [U. S.], 409; *Barnet v. Bank*, 98 U. S., 555; *U. S. v. Chouteau*, 102 Id., 611; *Hubbell v. Gale*, 3 Vt., 266; *Colburn v. Swett*, 1 Metc. [Mass.], 235; *U. S. v. Lathrop*, 17 Johns., [N. Y.], 4; *Teall v. Felton*, 1 Comst. [N. Y.], 537; *Ely v. Peck*, 7 Conn., 239; *Davison v. Champlin*, Id., 244; *Mo. Riv. Tel. Co. v. 1st Nat. Bk.*, 74 Ill., 217; *Francoisco v. Gilmore*, 1 Bos. & P. [Eng.], 179; *Woodgate v. Knatchbull*, 2 T. R., 154; 1 Bl., Com., 86; 1 Kent, Com., 397 *et seq.*; as to the third assignment: Code, secs. 19, 62; *McNamara*, Nullities, sec. 6; *Miller v. McIntyre*, 6 Pet. [U. S.], 61; *Sicard v. Davis*, Id., 124; *Holmes v. Trout*, 7 Pet. [U. S.], 171; *Johnston v. Dist. Col.*, 1 Mackey [D. C.], 427; *Hewit v. Penn. Steel Co.*, 24 Fed. Rep., 370; *Alexander v. Pendleton*, 8 Cranch [U. S.], 462; *Wright v. Hart*, 44 Pa. St., 454; *Trego v. Lewis*, 58 Id., 463; *Williams v. Randon*, 10 Tex., 74; *Wood v. Folsom*, 42 N. H., 70; *Gorman v. Judge*, 27 Mich., 138; *B. & M. R. Co. v. Lancaster Co.*, 4 Neb., 307; *Clark v. O. & S. W. R. Co.*, 5 Id., 318; *McKeighan v. Hopkins*, 19 Id., 33; *Ala. Gt. So. R. Co. v. Smith*, 81 Ala., 229; *Holliday v. Jackson*, 21 Mo. App., 660; as to the fourth assignment: *Marshall v. Vicksburg*, 15 Wall. [U. S.], 146; *National Bank v. Johnson*, 104 U. S., 271; *Hinterminster v. 1st Nat. Bk.*, 64 N. Y., 212; as to the fifth assignment: *Hogg v. Ruffner*, 1 Black [U. S.], 115; *Gruber v. 1st Nat. Bk.*, 87 Pa. St., 465; *In re Wild*, 11 Blatchf. [U. S.], 243; *Shinkle v. 1st Nat. Bk.*, 22 Ohio St., 516; *Wheelock v. Lee*, 64 N. Y.,

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247; *Howser v. Melcher*, 40 Mich., 185; *Carpenter v. Vail*, 36 Mich., 226; *Lynch v. Merchants' Nat. Bank*, 22 W. Va., 554.

J. A. Grimison, and *C. J. Phelps*, *contra*, cited: *Johnson v. Jones*, 2 Neb., 136; *Schuyler Nat. Bank v. Bollong*, 24 Id., 825; U. S. Rev. Stats., secs. 5197-8.

COBB, CH. J.

The plaintiff in the court below complained of the Schuyler National Bank that on October 3, 1884, he borrowed of the bank \$1,200 on his promissory note, due in six months, from which the bank deducted and retained as interest, in advance, for that time, \$109.80; that on June 12, 1885, he paid the note in full, and thereby paid to the bank, which knowingly contracted for and received interest thereon at the rate of 18 per cent per annum, a greater rate than is allowed by the laws of this state, and in violation of section 5198 of the Revised Statutes of the United States, which was corrupt and usurious, and occurred within two years prior to this complaint; by reason of which the bank became and was indebted to the plaintiff in \$219.60, no part of which has been paid.

II. That on April 6, 1885, the plaintiff renewed his note for said \$1,200, due in sixty days, and paid the bank, which knowingly contracted therefor, \$37.80 as interest, in advance, for that time, at the rate of 18 per cent per annum, a greater rate than is allowed by the laws of this state, and in violation of section 5198 of the Revised Statutes of the United States, which was corrupt and usurious, and occurred within two years prior to this complaint; by reason of which the bank became and was indebted to the plaintiff in the sum of \$75.60, no part of which has been paid.

III. It is further alleged that, under like circumstances, terms, and conditions, on October 16, 1884, the plaintiff borrowed of the bank \$800 on his promissory note, due in

six months, from which was retained as interest, at the rate of 18 per cent per annum, \$73.20, which note was paid in full on July 18, 1885; by reason of which the bank is indebted to the plaintiff in \$146.40, no part of which has been paid.

IV. And on April 16, 1885, he renewed the note for \$800, due in ninety days, and paid interest thereon \$37.20, in advance, at the rate of 18 per cent per annum; by reason of which the bank is indebted to the plaintiff in \$74.40, no part of which has been paid.

V. And on August 18, 1884, the plaintiff borrowed from the bank \$2,000 on his promissory note, due in ninety days, from which was retained as interest, at the rate of 12 per cent per annum, \$63, which note was paid in full on June 6, 1885; by reason of which the bank is indebted to the plaintiff in \$126, no part of which has been paid.

VI. And on May 16, 1885, he renewed the note for \$1,500, as the balance due on the \$2,000 loan, due in seven days, and paid interest thereon \$7.50, in advance, at the rate of 12 per cent per annum; by reason of which the bank is indebted to the plaintiff in \$15, no part of which has been paid.

VII. And on May 26, 1885, he renewed the note for \$1,500, due in seven days, and paid interest thereon, \$7.50, in advance, at the rate of twelve per cent per annum; by reason of which the bank is indebted to the plaintiff in \$15, no part of which has been paid.

VIII. That on November 10, 1884, the plaintiff borrowed from the bank \$1,000 on his promissory note, due in 135 days, from which was retained as interest, at the rate of 18 per cent per annum, \$69, which note was paid in full on June 15, 1885; by reason of which the bank is indebted to the plaintiff in \$138, no part of which has been paid.

IX. And on April 8, 1885, he renewed the note for

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\$1,000, due in thirty days, and paid interest thereon, \$16.50, in advance, at the rate of 18 per cent per annum; by reason of which the bank is indebted to the plaintiff in \$33, no part of which has been paid.

X. And on May 11, 1885, he renewed the note for \$1,000, due in twelve days, and paid interest thereon, \$7.50, in advance, at the rate of 18 per cent per annum; by reason of which the bank is indebted to the plaintiff in \$15, no part of which has been paid.

XI. And on May 26, 1885, he renewed the note for \$1,000, due in seven days, and paid interest thereon, \$5, in advance, at the rate of 18 per cent per annum; by reason of which the bank is indebted to the plaintiff in \$10, no part of which has been paid.

XII. And on June 15, 1885, he renewed the note for \$1,000, due in seven days, and paid interest thereon \$5, in advance, at the rate of 18 per cent per annum; by reason of which the bank is indebted to the plaintiff in \$10, no part of which has been paid.

XIII. That on September 30, 1885, the plaintiff borrowed from the bank \$150 on his promissory note, due in thirty days, from which was retained as interest, at the rate of 18 per cent per annum, \$2.50, which note was paid in full on November 2, 1885; by reason of which the bank is indebted to the plaintiff in \$5, no part of which has been paid.

XIV. And on November 2, 1885, he renewed the note for \$150, due in ninety days, and paid interest thereon \$7, in advance, at the rate of 18 per cent per annum; by reason of which the bank is indebted to the plaintiff in \$14, no part of which has been paid.

XV. And on February 1, 1886, he renewed the note for \$150, due in ninety days, and paid interest thereon \$7, in advance, at the rate of 18 per cent per annum; by reason of which the bank is indebted to the plaintiff in \$14, no part of which has been paid.

XVI. And on May 7, 1886, he renewed the note for \$150, due in thirty days, and paid interest thereon \$2.50, in advance, at the rate of 18 per cent per annum; by reason of which the bank is indebted to the plaintiff in \$5, no part of which has been paid.

XVII. That on January 2, 1886, the plaintiff borrowed from the bank \$500 on his promissory note, due in thirty days, from which was retained, as interest, at the rate of 18 per cent per annum, \$8.25, which note was paid in full on October 30, 1886; by reason of which the bank is indebted to the plaintiff in \$16.50, no part of which has been paid.

XVIII. And on February 1, 1886, he renewed the note for \$500, due in thirty-three days, and paid interest thereon \$8.25, in advance, at the rate of 18 per cent per annum; by reason of which the bank is indebted to the plaintiff in \$16.50, no part of which has been paid.

XIX. And on March 9, 1886, he renewed the note for \$500, due in thirty days, and paid interest thereon \$8.25, in advance, at the rate of 18 per cent per annum; by reason of which the bank is indebted to the plaintiff in \$16.50, no part of which has been paid.

XX. And on April 10, 1886, he renewed the note for \$500, due in thirty days, and paid interest thereon \$8.25, in advance, at the rate of 18 per cent per annum; by reason of which the bank is indebted to plaintiff in \$16.50, no part of which has been paid.

XXI. And on May 13, 1886, he renewed the note for \$500, due in thirty days, and paid interest thereon \$8.25, in advance, at the rate of 18 per cent per annum; by reason of which the bank is indebted to the plaintiff in \$16.50, no part of which has been paid.

XXII. That on January 18, 1886, the plaintiff borrowed from the bank \$200, on his promissory note, due in four months, from which was retained as interest, at the rate of 18 per cent per annum, \$12.25, which note was paid in

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full on February 26, 1887; by reason of which the bank is indebted to the plaintiff in \$24.50, no part of which has been paid.

XXIII. And on May 21, 1886, he renewed the note for \$200, due in ninety days, and paid interest thereon \$9.25, in advance, at the rate of 18 per cent per annum; by reason of which the bank is indebted to the plaintiff in \$18.50, no part of which has been paid.

XXIV. And on August 22, 1886, he renewed the note for \$200, due in six months, and paid interest thereon \$18.25, in advance, at the rate of 18 per cent per annum; by reason of which the bank is indebted to the plaintiff in \$36.50, no part of which has been paid.

XXV. And on June 9, 1886, he renewed the note for \$150, stated in the XVI cause of action, due in thirty days, and paid interest thereon \$2.50, in advance, at the rate of 18 per cent per annum; by reason of which the bank is indebted to the plaintiff in \$5, no part of which has been paid.

That the several sums so paid to the bank as usurious interest, and by it received as such, amount to \$544; by reason of which, and by the violation of the statutes of the United States, the defendant is indebted to the plaintiff in \$1,088, and the plaintiff demands judgment.

The defendant answered by a general denial.

There was a trial to the court, a jury being waived, with findings for the plaintiff, and judgment for the amount demanded.

The plaintiff in error brings the cause to this court on sixteen errors, such of which as are discussed in the brief will be considered in the order presented by counsel.

First—That the court below erred in overruling the defendant's motion to "strike from the petition the irrelevant, redundant, and scandalous matter therein."

From the brief of counsel it does not appear that the matter objected to in this motion as irrelevant and scandal-

ous was pointed out by a special designation of the words, and of the line and page of the petition in which they occurred, but by a reference to words of a certain import wherever they were used in the petition, to-wit, (meaning usurious interest), "so as aforesaid paid by the plaintiff to the defendant, and by the defendant knowingly contracted for and received from the plaintiff." These words, embraced in the motion, except that of "aforesaid," were held, in a former opinion of the court in this case (reported in 24 Neb., 821) to be a necessary allegation of the petition, under the statute, and were deemed of sufficient importance to be placed in the syllabus of the report. In regard to the inoffensive adjective "aforesaid," while its common and indiscriminate use in legal proceedings may too frequently have been redundant rather than significant, it does not seem open to that objection in this instance, as it properly specifies the violation complained of, and is not superfluous.

Second—That the court erred in overruling the motion to dismiss the case for want of jurisdiction.

This objection was presented in the original case and overruled, in the decision of 24 Neb., 821, in which the court refer to the previous decision, in the *Bank of Tecumseh v. Overman*, 22 Neb., 116, in which it is held "that the state courts do have jurisdiction of this class of causes," and it was said that the decision was rendered on a careful examination of the decisions of the several state and United States courts, and was believed to be correct. I will add that we have seen no reason to reconsider that decision.

Third—The plaintiff in error contends that the original paper writing in this action, denominated the petition, was duly adjudicated, upon error, in this court; that the same was not a petition, and therefore, notwithstanding the allegations of the amendments, the action was not commenced within the meaning of section 62 of the Civil Code until the filing in the district court of the amended petition

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(January 11, 1889) and the appearance of the defendant thereafter.

By reference to the decision, in the case cited, it will appear that the court did not adjudicate that the paper writing was not a petition; but it overruled the motion to strike it from the files for want of legal verification, and held "that the motion to require the plaintiff to separately state and number the causes of action should have been sustained," and the judgment of the court below, overruling such motion, was reversed.

Doubtless there is an abstract rule of reasoning by which it may be contended that a petition which falls short of the requirements of the law is not a petition; but a rule of that severity does not prevail in the interpretation of statutes, and especially of the statute of amendments to pleadings in civil actions, which owes its existence to a necessity for the application of liberal rules in the furtherance of justice.

By reference to the original petition, not of record, but brought up in the bill of exceptions, it appears that the plaintiff, instead of separately stating and numbering the twenty-five causes of action, presented them in seven paragraphs, each embracing two or more causes of action. While this pleading was not sustained when the cause was previously before this court, and would not now be if the question were again presented, it does not follow that the pleading was null, and not susceptible of amendment, but, on the contrary, it was capable of the amendments which were made, obviating the defects complained of.

From an examination and comparison of the amended petition with the original, it does not appear that any new cause of action is set up, but that they are all the same causes of action originally brought, "separately stated and numbered," as required by sec. 93 of the Code, but are the same in fact. Hence it is held that the amended petition is substantial with the original in inception and filing, and that the action was, in law, commenced with the service of

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the summons in the case, and that I may not be misunderstood, there was no requirement of an *alias* summons following the amended petition. The case is clearly within the rule "that a party may amend his pleading while he preserves the identity of his cause of action," and "that a court may permit a petition to be amended when the proposed amendment does not change substantially the claim, although the form of the action may be changed." (*Clark v. The O. & S. W. R. R.*, 5 Neb., 318; *McKeighan v. Hopkins*, 19 Id., 34.)

Fourth—This assignment is based upon the proposition that the amount of recovery in the court below is too large; that the defendant in error was permitted to recover twice the full amount of interest found to have been paid, while the recovery should not have been for more than twice the sum taken in excess of the legal rate.

This proposition was considered at the July term of this court, 1888, in the review of the third case of the *Schuyler Natl. Bank v. Bollong*, on error (24 Neb., 825), in which it was held that "where the usurious interest is discounted from the face of the note, the bank can recover only the face of the note less the interest deducted," but "if the borrower pays the usurious interest in advance, he may recover double the interest so paid," which latter provision clearly applies to the condition of payment, and the measure of recovery in this instance. The fourth error is therefore overruled.

Fifth—This error is directed exclusively to the first, third, fifth, and eighth causes of action, and the admission of evidence thereunder, on the ground that the statute of limitations had run against them.

By reference to the amended petition, and the first cause of action stated, it will be seen that the plaintiff alleged that on October 3, 1884, he borrowed \$1,200 on his promissory note, due in six months, that the defendant contracted for and retained \$109.80, as six months' interest, in ad-

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vance, and that on June 12, 1885, he paid the note of \$1,200 in full, and thereby paid the defendant, who knowingly contracted for and received, the sum of \$109.80 as interest for six months on \$1,200.

Now it is clearly the object of the plaintiff in error to contend that this cause of action accrued on October 3, 1884, and not on June 12, 1885, when the interest was actually paid and received on the money borrowed. Howsoever this point should be decided, if in issue and presented, in order to raise the question the record must show that the action was commenced within two years from June 12, 1885, and more than two years after October 3, 1884, which the record does not show, and which leaves the point out of consideration.

Upon one of the points already considered, it was contended that the actions should be held to have commenced with the filing of the amended petition, January 11, 1889; but the court holds otherwise, and we have intimated as the opinion of the court, that notwithstanding the amendments to the original petition, the action was, in law and in fact, commenced with the issuance of the summons to the defendant, and no copy of the writ being set forth, we are without information as to the exact date. This error will not, therefore, be further considered.

The sixth error, as to whether the allegations of the petition, that the defendant "knowingly contracted for and received interest thereon at the rate of 18 per cent per annum," are made out by such convincing proofs of an affirmative character, or by such satisfactory and necessary proofs as are usually required, counsel say they do not care to discuss, and the point will not, therefore, be further considered.

The seventh and eighth assignments appearing to be conclusions merely from predicates overruled, or not established, are to be considered adversely.

Both the legality and the propriety of the judgment of the

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court below are the conclusions to which we are conducted by both the letter and spirit of the federal statute, and that judgment will therefore be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

GEORGE E. BROWN V. JOHN B. DRAKE.

[FILED FEBRUARY 18, 1890.]

THE EVIDENCE examined, and *held*, to sustain the verdict to the extent of \$295.25; but that as to \$204.75 of the sum found by the verdict, it is not sustained, and the latter sum required to be remitted or the judgment will be reversed.

•
ERROR to the district court for Adams county. Tried below before GASLIN, J.

Capps, McCreary & Stevens, for plaintiff in error.

Tibbets, Morey & Ferris, contra.

COBB, CH. J.

The plaintiff below alleged that on April 7, 1888, he contracted with the defendant for an exchange of certain real and personal property, and the payment to defendant of \$2,000 according to the following stipulation:

“EXHIBIT A.

“For lots in Omaha city described as follows: Lot 5, block 5, Kendall's addition; lots 1, 2, 3, 4, B. 8; 12, 18, Bk. 9; 12 and 18, in Bk. 27; 8, 9, 10, 11, and 12, B. 34; L. 1, 11, 12, 13, and 14, B. 40; L. 1, 2, 23, and 24, B. 41;

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in all, 20 lots, in Boggs' addition to Omaha, and \$2,000 cash, I agree to transfer to J. B. Drake, all cattle in my herd, not less than 125 head, not including late calves, and including 4 bulls, one span young black mares in foal, one span geldings, 4 years old; one span mules, 6 or 7 years old; one bay horse, 6 years old; four colts, 1 to 2 years old; all good American stock, no pony; 3 wagons; 3 hay sacks; 3 sets of harness; 1 stallion, Winona, bay; also equity in N. E. quarter, section 22, township 7, range 16, Kearney county, incumbrance \$1,000.

"GEORGE E. BROWN."

That in accordance with said agreement the plaintiff paid the defendant the said sum of \$2,000, and the defendant delivered to plaintiff what purported to be a bill of sale of the personal property mentioned, referred to as Exhibit B.

It was further verbally stipulated that the cattle mentioned might be left with the defendant until called for, by the 24th of April, 1888, and that defendant execute a warranty deed for the premises described in Kearney county free of all incumbrances except that of \$1,000, with an abstract of title to the premises.

That plaintiff fully complied with all the conditions of the contract on his part, and on April 21, 1888, demanded the cattle of the agent of defendant, in whose care and possession they were, but who refused to deliver the same.

That at the time of entering into the contract the defendant falsely represented, for the purpose of defrauding the plaintiff, that the cattle were free of all liens, mortgages, and incumbrances, when, in fact, there were chattel mortgage liens, in all amounting to \$1,400, then unknown to plaintiff, which were not entirely discharged until May 14, 1888; and through the failure to deliver the cattle and discharge the liens thereon, and the consequent loss of time and the additional expense involved, plaintiff suffered damages to the amount of \$400.

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That the whole number of cattle in the herd at the time of the contract, and on April 21, following, was 131 head, but defendant delivered on May 14, following, only 118 head, and refused to deliver or to pay for the remaining 13 head of cattle, amounting to \$390; that of the cattle delivered 50 head were not the same mentioned in the contract and bill of sale, but were a different kind and inferior quality, and were worth \$500 less than those purchased of defendant, and were not accepted by plaintiff in lieu of those purchased.

That there is now due on the land conveyed by defendant to plaintiff the tax sale, with accrued interest, of 1886, taxes and interest of 1887, and accrued interest on the mortgage of \$1,000, amounting to \$250.15, valid and existing liens, which the defendant has neglected and refused to pay; that defendant failed to deliver an abstract of title to the land, which the plaintiff obtained at his own expense, amounting to \$4.

Plaintiff asks judgment for the sum of \$1,544.15.

The defendant answered in a general denial of the plaintiff's cause of action.

2. The defendant further set up that, after the alleged cause of action accrued, and before the action was brought, on May 14, 1888, at Hastings, Nebraska, all matters of difference in damages alleged in plaintiff's petition, the feeding of stock, death of stock, herding of cattle in question, cost of deed, abstract, back entries, and taxes, and all other matters in difference, were settled and fully adjusted between the parties, and the plaintiff at the time drew and delivered to defendant his check on the Omaha National Bank for the sum of \$25 in payment of the balance then found due from him, in full satisfaction and discharge of the damages in the petition claimed and demanded of defendant.

The plaintiff replied in a general denial of the defendant's answer.

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There was a second trial to a jury, a new trial having been granted on the motion of the defendant, with findings for the plaintiff and verdict for \$500 damages.

The defendant's motion to set aside the verdict being overruled, judgment was entered for that amount and costs.

The plaintiff in error presents thirteen separate assignments to the sufficiency of the evidence and the instructions of the court to the jury.

It appears that, on the trial, the plaintiff below testified, as a witness in his own behalf, that on April 3, 1888, he bargained with the defendant for a lot of cattle, and drew up the agreement set forth, which was signed by defendant.

By this stipulation, in consideration of the lots therein mentioned, and of \$2000 cash, the defendant agreed to transfer to plaintiff the cattle and stock, and the personal and real property mentioned, in pursuance of which defendant executed a bill of sale on April 7, 1888, for the following property: "125 head of cattle; 1 span of black mares, 6 years old; 1 span of bay geldings, 4 years old; 4 yearling colts; 1 bay stallion, *Winona*; 3 wagons with hay racks; 3 sets of double harness; the same being on the farm at Newark, and the Island, and at defendant's barn in Hastings, as seen by the plaintiff the same day."

That after the delivery of the contract and bill of sale witness had a conversation with defendant, in which it was agreed that the cattle were to be delivered on April 20, 1888; that on that day witness came up from his residence, in Omaha, to defendant's residence, in Hastings, to receive the cattle, and there was some conversation then had as to the deeds witness was to make, under the stipulation, "or rather that two lots had, by mistake, been left off his deed; he told defendant he would send and have the deeds sent up the next morning, but he would not wait, and witness took the next train to Omaha, and came back with the deeds and delivered them to defendant's wife, who gave

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witness an order, on the man in charge of the cattle, to turn them over to witness, but the man refused, saying that Mr. Graham told him not to, as he had a chattel mortgage on them for \$1,080. Witness returned to Hastings, and saw defendant's wife, and in a few days afterwards the mortgage matter was arranged by her, and about the first of May witness made a second demand for the cattle, which the foreman refused, on his claim for a feed bill of \$100, which witness said he would pay under protest."

The plaintiff does not testify that he paid the \$100, but that the agent refused, for the reason that Mr. Radford owned part of them. He further testified, that defendant was, for a portion of the time, between April 23 and May 12, absent in Chicago. In reply to inquiry from his counsel he stated "that he returned with the deed for the two lots that were lacking, he thought on April 25; that he demanded the cattle on May 1, and that he obtained them on May 14; that from April 25 to May 14 he was between Newark, where the cattle were in herd, and Hastings, a part of the time at either place, using every endeavor to get things straightened up, so he could get possession of the cattle."

Q. What claim, if any, did Brown make on you from the 25th of April to the 14th of May?

A. He made a claim for the feed and keeping of the cattle.

Q. What conversation did you have with him on April 20, when you first came here for the cattle?

A. Not very much. Witness first met him at his house; the next time at the depot, as he was taking the train for Chicago, and he refused to deliver the cattle until the deeds were delivered; witness offered to secure him through the bank here, for the lots, and have the deeds for him the next morning, but he would not do that, nor give an order to take the cattle when witness should get the deeds.

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Q. What kind of cattle did you view, when down there on the 7th of April, with Brown?

A. I viewed 122 or 123 of the 125 head. They were good cattle, mostly large, not over twenty or twenty-five young cattle—yearlings; the rest were cows and two-year-old steers.

The plaintiff also testified that he knew the value of cattle in the markets of that season; that he was buying and selling cattle, and the average value was about \$27 per head; that when he received the cattle there were 117 head, an inferior lot of cows, the steers were as first inspected, and the balance a very inferior lot of yearling steers and heifers. Of the original herd inspected, he thought there were thirty-five or forty head of cows taken out, and an inferior lot of yearlings substituted; that the thirty-five cows taken out were worth \$30 per head, and those thus substituted not to exceed \$12 per head; that plaintiff's expense from the 25th of April to the 14th of May, when he received the cattle, was that of the board of two men and his own, back and forth from Hastings to Newark, and telegraphing, and two trips to Minden to get the mortgages fixed up, which required three and three-fourths days; boarding at Hastings for three men at \$2 per day, \$33; his own boarding with that of the three men, up to May 14, was \$75. There were other expenses: getting deeds recorded, and two trips to Minden, and for the plaintiff's time expended, eighteen days, at \$10 per day, \$180.

The plaintiff introduced the deed from the defendant and his wife, for the quarter section of land stipulated to be conveyed to the plaintiff, containing the usual contract of warranty, except as to two certain mortgages of \$700 and \$300, amounting to \$1,000, and the taxes of 1888, claiming, in his testimony, that of the interest paid up to the 1st of June, on the \$700 lien, \$31.50 was due from defendant, and on the \$300, \$20.25 was also due, as the accrued interest, prior to the transfer of the property.

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The testimony of plaintiff relating to the settlement with defendant is given in full, as follows:

Q. State when you had your last conversation with the defendant and what it consisted of.

A. It was May 13th, when witness came down from Newark, after defendant had settled with Radford, and witness wanted to make arrangement to get away the next day. Defendant had charges against witness for keeping the cattle from April 7th to May 13th. Witness was not to have paid these charges, but he refused to deliver the cattle, and gave instructions to his men not to deliver them until the charges were paid. After being delayed so long, witness was willing to do most anything so he could get away. Defendant demanded pay, and after talking sometime he told witness, "you pay me \$25 and you can take the cattle." Witness said that he had got to pay it, he supposed, as he must get away, but he said that he "did not consider it due, and that it was no settlement, and there would be a settlement hereafter." So witness gave him a check for \$25, left his house, and got the cattle,— got 117 head of them, not then knowing about the changes in the herd until he got possession of them.

Robert Radford, a witness for the plaintiff, testified that he resided at Newark, was acquainted with the parties, was present at the time they came there to inspect the cattle purchased by plaintiff of defendant, about April 7, 1888; knew the cattle there, about 133 or 134 head; they were not all defendant's cattle, part belonged to witness. Samuel Tweed was the agent in charge of defendant's cattle there.

Q. What conversation had you with Tweed, if any, or what did he do, if you know, in regard to the changing of these cattle?

A. There were about thirteen of the best cows taken out, and other stock put in their place.

Q. What was the value of those cows at that time, and what of the yearlings substituted?

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A. The cows \$30 per head, and the yearlings about \$13 per head.

This witness further testified that 117 head were turned over to plaintiff; that five head had perished in a storm, the 1st of May, of those originally inspected, and that after plaintiff had taken the stock away, there were fifteen left on the farm, and two cows, let out for milk.

Fred Radford, a witness for plaintiff, testified that he resided at Newark; was acquainted with the parties to this suit; was first acquainted with the plaintiff April 7, 1888, when he came down to inspect the cattle, which witness was herding and feeding, and which plaintiff took away May 1.

Q. What cattle, if any, had been substituted?

A. There were thirteen of the best cows taken out, and yearling cattle put in their place, between the 15th and 20th of April.

Q. Who were you working for?

A. Under Tweed, who was foreman for Brown. He instructed me to make the change. The cows taken out were worth \$30 per head, and the yearlings substituted from \$12 to \$13 per head—they were poor. Two cows, two steers, and a heifer died and were lost in the storm of May 1.

The defendant was sworn as a witness and testified, in reference to the alleged settlement between the parties, that the last deed made by plaintiff, for the two lots omitted in prior deed, was delivered on April 27; that the next time witness saw plaintiff was at witness's house, in Hastings, on May 12, when we had conversation on matters pertaining to the stock. He left on a freight train for Newark, on that day, to see Radford, and came back in the evening and made arrangements to meet at witness's house on May 14th, and he came on that day.

Q. Who was there?

A. My wife, Miss Teeter, the plaintiff, and myself. There was a short talk about the stock, about the feed bill,

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and of the stock that had perished; when he got through he came in to settle; he stated that in my absence he had been to some inconvenience in not getting his stock, and asked who witness thought should stand the loss of the seven head that had perished; the witness thought the plaintiff should as they were his cattle, and then they turned to the feed bill for 125 head of cattle, 7 head of horses, and 4 colts; he suggested that as he had been put to trouble and expense witness ought to make some allowance on the feed bill, and mentioned some items, such as recording two deeds, \$2; abstracts on same, \$2; interest unpaid to date of deed, \$27; taxes, \$14.50 and \$16.54; those he thought witness ought to pay—a total of \$52.15. He stated that if he paid Radford's bill of \$23.60, for taking care of the cattle, witness ought to call it square with him; to which witness replied he did not think it fair that he should stand such a bill, but "that if plaintiff would give him \$25 he would call it all square, and jump the whole matter and a settlement," and the plaintiff said "he would do it," and sat down and wrote a check, and witness gave him a receipt for the whole business.

Q. What was said about plaintiff's expenses subsequent to April 20, including the pay and board of his men; or what did he come to your house for, if you know, on May 14?

A. He said he came to settle our matters on the feed bill, as he wanted to close it up and get away.

Q. Were all matters of difference between you considered?

A. Yes, sir, all matters were talked over, taxes, interest, cattle that had died, feed bill, and everything.

Q. Previous to that time had you loaned him money, and if so, how much?

A. Yes, sir; \$25, about the 8th of April, which was included in the settlement.

Q. Have you had any transactions with him since?

A. None.

This testimony of defendant is, in the main, corroborated by that of his wife and of Florence Teeter.

The evidence on the part of the plaintiff below, under the seventh cause of action, as set out in the petition, to say the most to be claimed for it, was scarcely sufficient to sustain a verdict thereon, had there been no alleged settlement between the parties of their business transactions; and the whole of the evidence applicable, as well on the part of the plaintiff as on that of the defendant, tends to prove that there was such a settlement on May 14, 1888, and that it embraced the several claims of the plaintiff set up in the seventh cause of action. But such settlement clearly did not embrace the claim for shortage in the delivery of the cattle bargained for, and the substitution of inferior stock for those of greater value as set out in the eighth and ninth causes of action, and in the testimony of the plaintiff and the two witnesses Radford. For the plaintiff testified that at the time of the alleged settlement, before the cattle were turned over to him, he was not aware of the deficiency. There is some confusion in the evidence as to the precise number of cattle to which the plaintiff was entitled. The stipulation called for all the cattle in defendant's herd, not less than 125, not including late calves.

In the examination of witnesses by plaintiff's counsel there is no attempt to prove, and certainly no proof, that there were in the herd, at the time of the sale, more than 125 head.

There was proof that Radford claimed to own ten head of the cattle; and also that there were seventeen head, fifteen yearlings and two cows, on Feather's place, belonging to defendant. It is possibly the theory of the plaintiff that, as the defendant sold him the herd, not less than 125, and as there were ten or more on the place additional, and the defendant had an equal number not in the herd, but on another farm, the plaintiff was entitled to those, equal to the number of Radford's which were in the herd at the

time of the sale and inspection by the parties. This theory, to my mind, is not admissible. There is no pretense that the plaintiff counted the cattle at the inspection, and it does appear in writing, and throughout the transaction, that the number was limited to 125. As claimed by the plaintiff below, in his petition, one hundred and eighteen were delivered and received, leaving a deficiency of seven. There is proof that five head were lost by storm on the 1st of May, between the sale and the delivery. According to the evidence of the defendant, and of two witnesses, that loss was one of the accounts embraced in the settlement of May 14; and the plaintiff testifying as to the same transaction, makes no mention of the loss, though examined in rebuttal, after the defendant's testimony was closed, and is questioned by a juror as to his receipt of the cattle in a condition different from that at the time he bought them, and says nothing of the loss of cattle by death, or that defendant disclaimed any such loss.

There is evidence that a number of the cattle were wrongfully exchanged for others of less value, which were subsequently delivered to the plaintiff. The difference of value of those taken out of the herd, and of those substituted, the plaintiff is entitled to recover. There is a wide difference, however, between the plaintiff's estimates of the number thus taken and substituted, and of the consequent loss sustained, and that of the apparent weight of evidence in the case on those points. He does not, however, claim to have any exact knowledge of the number or the value of those taken and exchanged.

The witness R. Radford, who was in possession of the premises where the cattle were herded and fed, states that the number taken out was thirteen cows, valued at \$30 each, \$390, and there were substituted thirteen yearlings valued at \$13 each, \$169; on account of which the plaintiff's loss would be \$221.

The witness F. Radford, who was the herder under

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Tweed, the defendant's foreman, testified that he made the exchange under the orders of the foreman, corroborating this estimate of the number and value of the cattle taken out and substituted. It would seem to satisfactorily establish the estimate as stated.

On either theory, that the loss of the five cattle of the herd by storm was the plaintiff's loss, or that his claim for them was embraced in the settlement of May 14, there would still appear to be two head of cattle to be accounted for by the defendant. The plaintiff's evidence fixing the average value of the cattle at \$27 each, in the absence of other evidence as to the fact, will be accepted as correct, thereby finding the additional sum of \$54 due the plaintiff, and a total of \$275 on account of the cattle due from the defendant.

The verdict in the court below to this extent we find sustained; to a larger amount it does not appear to be supported by the evidence. There was evidence of a mortgage lien on the land conveyed to the plaintiff greater than the amount excepted in the covenant of warranty, but it is not claimed that such excessive lien had been discharged, nor will it be claimed that an action lies therefor until it has been discharged.

In addition to the finding of \$275 the plaintiff would be entitled to interest thereon from May 14, 1888, to the date of judgment, June 4, 1889, amounting to \$20.25.

It is therefore considered that the judgment of the district court will be reversed, and the cause remanded for further proceedings, unless the defendant in error shall, within thirty days from the filing of this opinion, enter a remittitur in the office of the clerk of this court of the sum of \$204.75 as of the date of the judgment in the court below; and in that case the judgment is otherwise affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

V. H. KENDALL ET AL. V. ELI ALESHIRE.

[FILED FEBRUARY 18, 1890.]

1. **Sheriffs: FRAUD: FALSE IMPRISONMENT: BONDSMEN: LIABILITY.** M., sheriff of N. county, had in his hands a warrant for the arrest of A. upon a criminal charge; A. was a resident of Kansas and was not found in this state; M. went to Kansas, and by the false representation, that he held a warrant for the extradition of A. as a fugitive from justice, induced A. to submit to arrest, and accompany him to this state, where he imprisoned him; *Held*, that the acts of M. within the state of Kansas were without either the virtue or the color of law and not binding upon the sureties on the official bond of M., but that so much of the imprisonment of A. as occurred within this state, though wrongful, was done by M. by virtue of his office as sheriff, and for it the sureties on his bond are liable.
2. **Evidence.** Certain testimony admitted on the trial examined, and *held*, wrongly admitted.

ERROR to the district court for Nuckolls county. Tried below before HAMER, J.

• G. R. Chaney, G. W. Stubbs, and C. F. McGrew, for plaintiffs in error:

The allegations of the petition are wholly insufficient to warrant the admission of any evidence tending to hold the bondsmen liable. They can be held only for acts done *virtute officii*; not for those done *colore officii*. (*Huffman v. Kopplekom*, 8 Neb., 344; *Ottenstein v. Alpaugh*, 9 Id., 240; *Scott v. State*, 46 Ind., 203; *Gerver v. Ackley*, 37 Wis., 44; *State v. Conover*, 28 N. J. L., 224; *Seeley v. Birdsall*, 15 Johns. [N. Y.], 267; *Mandeville v. Guernsey*, 51 Barb. [N. Y.], 99; *Matter of Tilton*, 19 Abb. Pr. [N. Y.], 50; *Scloss v. White*, 16 Cal., 65; *Bromley v. Hutchins*, 8 Vt., 194; *Gaynor v. Wilde*, 38 Pa. St., 300; *Crane v. Bedwell*, 25 Miss., 507; *Kent v. Roberts*, 2 Story [U. S.], 191.) And this is true even where acts *colore officii* amount to a per-

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sonal trespass. (*Morris v. Van Voast*, 19 Wend. [N. Y.], 283; *State v. Mann*, 21 Wis., 693.) Bondsmen of an officer do not become his sureties to keep the peace. (*State v. Conover*, 28 N. J. L., 230.) A sheriff, as a ministerial officer, can perform none but authorized acts. (*People v. Collins*, 7 Johns. [N. Y.], 549; *Vose v. Deane*, 7 Mass., 280.) If an officer undertake to serve process which he cannot legally serve, his acts are simply those of a citizen and his bondsmen are not liable. (*Gage v. Graffam*, 11 Mass., 181; *Filkins v. O'Sullivan*, 79 Ill., 524.) Evidence was improperly admitted as to conversation between the sheriff and Aleshire in Kansas, in the absence of the bondsmen. (1 Greenleaf, Ev. [13th Ed.], sec. 187.)

S. A. Searle, contra:

The acts of the sheriff, from the making of the complaint to the imprisonment of defendant in error, were done *virtute officii*, and constituted a breach of the bond which gives an action against both principal and sureties. (*Alley v. Daniel*, 75 Ala., 503; *Van Pelt v. Littler*, 14 Cal., 194; *Huffman v. Koppelkom*, 8 Neb., 344; *Koppelkom v. Huffman*, 12 Id., 98; *Trieman v. Haw*, 49 Ia., 315; *Lammon v. Feusier*, 111 U. S., 17, 22; Murfree, Official Bonds, sec. 303.) Levy upon the goods of one not named in the writ is a breach of the bond. (*Jones v. People*, 19 Ill. App., 300; *Noble v. Himes*, 12 Neb., 193.) So also is a seizure of property outside the county, under a writ of attachment (*Parmlee v. Leonard*, 9 Ia., 131); and levy on exempt property (*Strunk v. Ocheltree*, 11 Ia., 158). Official acts are not confined to lawful acts performed in serving process; else the sureties would never be liable. (*Turner v. Sisson*, 137 Mass., 191.) In the absence of proof to the contrary, an officer *de facto* is presumed to be one *de jure*. (*Prell v. McDonald*, 7 Kan., 426.) An officer cannot serve his own process. (Cooley, Torts, pp. 222, 223, and cases cited.)

COBB, CH. J.

This action was brought in the district court of Nuckolls county by Eli Aleshire, plaintiff, against Thomas A. Meeker, V. H. Kendall, L. W. Beale, A. C. McCorkle, L. B. Adams, and D. B. Ayres, defendants.

The petition alleges the election of said Thomas A. Meeker to the office of sheriff of Nuckolls county, for the term of two years from the Thursday after the first Tuesday in January, 1886; that he gave a bond as such sheriff, with the other defendants as his sureties; took the oath of office and entered upon the discharge of his duties as such sheriff; that on the 12th day of October, 1886, while the said Meeker was acting as such sheriff, under and by virtue of said election and qualification, he filed a complaint in writing before one A. Sterns, a justice of the peace in and for Nuckolls county, charging the plaintiff with having, on the night of October 2, 1886, feloniously and unlawfully stolen, taken, and driven away a number of neat cattle of the aggregate value of \$142. (Here follows a copy of the complaint.) That at the time of making said complaint said Meeker well knew that said Aleshire had not stolen, taken, and driven away said animals, as charged in said complaint, and that said Meeker had no reason to believe, nor did he honestly believe, that said Aleshire was guilty of said offense; that in making said complaint said Meeker acted officially, as sheriff of said county, and did so fraudulently, and with a design to harass and oppress the said Aleshire; that upon the filing of such complaint the said justice of the peace, with whom the same was filed, issued a warrant in due form directed to the sheriff, Thomas A. Meeker, to pursue and arrest the said Eli Aleshire, if found in the state of Nebraska, and bring him before the said justice, or some other justice of said county. (Here follows a copy of warrant, together with the return thereon, signed by T. A. Meeker, sheriff; that said writ was re-

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ceived October 12, 1886, and that on the 15th day of October, 1886, he served the same on the said Eli Aleshire by taking him into custody and then had his body before this said justice; dated October, 16, 1886.) That the plaintiff, on the date of said complaint and warrant was, and for a long time prior thereto had been, a resident of Rawlins county, in the state of Kansas, which fact was well known to said Meeker at the time he made the said complaint and received the said warrant; that in the execution of the said warrant the said Meeker, acting in his official capacity as such sheriff, pursued said plaintiff, Aleshire, out of the state of Nebraska and into Rawlins county, Kansas, intending thereby, under color of his office of sheriff, and acting by virtue thereof, to harass and oppress the plaintiff; did pretend to arrest, and did arrest, the plaintiff in Rawlins county, Kansas, and illegally and unlawfully, and without authority of law for so doing, did convey the said plaintiff out of the state of Kansas and into Nuckolls county, Nebraska, where the said Meeker unlawfully and unjustly detained the said plaintiff for the space of ten days, and which detention, had and made as aforesaid, was under color of his said office and by virtue thereof; and that the said Meeker did on the 15th day of October, 1886, without lawful authority, forcibly seize and confine the said Aleshire in the county of Rawlins, in the state of Kansas, with the intent him, the said Aleshire, to take out of the state of Kansas against his will; and the said Meeker did then and there, while so acting in his official capacity as sheriff of Nuckolls county, pretend to said Aleshire that he had authority, by virtue of the warrant issued by a justice of the peace of Nuckolls county, to seize and confine him, the said plaintiff, and take him out of the state of Kansas into the state of Nebraska, and did so confine him, the said Aleshire, and take him fraudulently from the state of Kansas, intending to unlawfully and unjustly harass and oppress him, the said Aleshire.

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That the said complaint made by the said Meeker against the plaintiff was fraudulently and maliciously made, and without reasonable and probable cause, and the plaintiff was by the said Meeker falsely and maliciously charged with the larceny of said cattle, when there existed no reasonable and probable cause therefor; and that the said Meeker, under color of his said office and by virtue thereof, on the warrant issued and directed to and received by him as aforesaid, did on the 15th day of October, 1886, in Rawlins county, Kansas, seize and confine him, the said Aleshire, and convey him to Nuckolls county, Nebraska, and before the justice of the peace who issued the said warrant; whereupon, on the motion of the said Meeker, the hearing was postponed until the 18th day of said month, when on the further motion of said Meeker, the hearing was again postponed until the 19th day of said month, on which day the said Meeker failed to produce for and in support of his said complaint, any testimony; whereupon the court dismissed the cause, and discharged the defendant therein, the said Aleshire, and the said prosecution was then fully ended; that all the time, from the 15th day of October to the 19th day of said month, the said Meeker, without lawful authority, but while acting in his official capacity, and by virtue of his said office, did unjustly and unlawfully, and without probable cause, confine said Aleshire in the jail of said Nuckolls county, and so did not perform the duties of his said office, as required by law, but has therein wholly failed, and that, by reason of which said several premises, the plaintiff has been greatly injured in his credit and reputation, and brought into public scandal, infamy, and disgrace, and has suffered great anxiety of body and mind; and has been forced to pay out and expend large sums of money, to-wit, the sum of \$50 in prosecuting his discharge from said imprisonment and in defending himself, and has been prevented, by reason of the premises, from transacting any business for the space of fifteen days, to the damage

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of the plaintiff in the sum of \$500, etc., with demand for judgment. A summons issued against all of the defendants and was returned served upon all except Meeker and Ayres, who were not found. Defendants Adams, Beal, Kendall, and McCorkle answered jointly, in form, but in substance, separately, each for himself and not for the others, admitting the election and qualification of defendant Meeker, as sheriff of Nuckolls county, the execution of the bond set out in the petition, by the said Meeker as principal and the answering defendants and one D. B. Ayres as sureties for said Meeker, on said bond; that if the said Meeker made the arrest charged in the petition in the state of Kansas, he did so without having first procured a requisition upon the governor of the state of Kansas for the delivery and return of said plaintiff to the state of Nebraska to answer a criminal charge, and they and each of them denied each and every other allegation contained in said petition, with demand for judgment.

There was a trial to a jury, with verdict and judgment for the plaintiff in the sum of \$2,500.

The defendants bring the cause to this court by petition in error, and assignment of twenty-two errors, so many of which as are argued by counsel in the briefs and are deemed necessary will be considered.

The first error presented and argued in the brief of counsel is, "That the trial court erred in overruling the objection of defendants to the admission of any evidence upon the trial against the answering defendants." This objection was rightly overruled. The petition does contain a cause of action against the answering defendants. Meeker, as sheriff of the county, had a warrant in his possession, directed to him, issued by a justice of the peace of the county, for the arrest of the plaintiff upon a criminal charge; this warrant was, for aught that appears, fair on its face. It was the duty of the sheriff to arrest said Aleshire, defendant in said warrant, if found within this

state; it was not his duty, nor had he the power, to arrest him out of the state. When he entered the state of Kansas, his acts were those of an individual without either the virtue of office or the color of office, and yet there is a sense in which his acts, in the state of Kansas, are binding upon his sureties as sheriff. If while in that state he used either force or fraud upon Aleshire, by which he brought him across the dividing line into this state, and there held him in custody, as charged in the petition, so much of that act as was committed in this state was done *virtute officii*; and if wrongful, and to the prejudice of the plaintiff, the defendants are liable to him. We have stated above that had the sheriff *found* Aleshire in this state it would have been his duty to arrest him upon the warrant. But, if he brought him within the limits of the state, by force or fraud, although he was in fact in this state, he was not *found* within it, within the meaning of the law, or the language of the warrant; and his detention under these circumstances, while done *virtute officii*, was wrongful and actionable, and within the contemplation of his official bond. The illegality of Aleshire's detention and imprisonment in Nuckolls county springs out of, and is based upon, the force or fraud, or both, by which he was brought from Kansas to this state; and it is in this sense that the acts of Meeker are binding upon the sureties on his official bond in Nuckolls county. Had he assaulted, imprisoned, or otherwise wronged Aleshire, in Kansas, but never brought him to this state, he alone would have been liable.

The above views, I think, substantially dispose of the case. If they are correct it follows that there was a vast amount of irrelevant testimony permitted to go to the jury, over the objections of the defendants, which testimony was highly prejudicial to the defendants. Of this character is all that part of plaintiff's testimony in relation to the condition in which he left his family at their home

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in Kansas, the amount of stock they had to care for, the plans he had made for providing for his family, his stock, and other property at the time of his arrest; the size and number of his family at the time of his arrest, and their age and condition. Also that, in relation to where plaintiff went after he was discharged from custody, how long he stayed there, and for what purpose; his necessary expenses for board and travel after he was discharged, the work he resumed after his return to Kansas, and the business he was engaged in at the time of his arrest; that the fact of his arrest became noised about in the neighborhood where he lived; that he lives in the same neighborhood yet; and the fact that his arrest became known to his friends in other states. None of this testimony was admissible as against the answering defendants, even if it would have been as against Meeker, which is doubtful; it was all admitted over defendants' objections and must be presumed to have contributed largely to swell the verdict.

The testimony of the plaintiff is clear that he was arrested by Meeker in Kansas, under the pretense that he had taken a requisition to the governor of Kansas, upon which a warrant had been issued for the arrest and extradition of Aleshire as a fugitive from justice. And it is admitted in the answer, that there was no such requisition. It therefore follows that Meeker, by fraud, induced Aleshire to submit to arrest by him in Kansas, and by this means got him into this state, where he held him in prison by virtue of his office and the warrant which he held; yet, nevertheless, wrongfully and unlawfully, by reason of the wrongful and fraudulent means resorted to to bring him within the reach of the office and warrant of Meeker.

As above stated, so much of the imprisonment of the plaintiff as took place within this state was for the reasons above stated, in violation of the official bond of Meeker as sheriff, being wrongful, yet done by virtue of his office, and

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for the damages directly resulting therefrom the answering defendants are liable.

The judgment of the district court is reversed and the cause remanded for further proceedings, unless the defendant shall, within forty days from this date, make and file in this court a remittitur in said cause in the sum of two thousand dollars, of the date of the judgment in the district court; but that in case such remittitur is made and filed within the time limited, said judgment is affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

WILLIAM C. GRIFFITH V. JAMES WOOLWORTH.

[FILED FEBRUARY 18, 1890.]

1. **General Denial: AFFIRMATIVE PROOF NOT ADMISSIBLE UNDER.** Where the answer is a general denial, the issue presented by the pleadings is the truth of the allegations of the petition. Under such an issue affirmative proof in favor of the defendant cannot be received, and an instruction submitting such proof to the consideration of the jury is erroneous.
2. **Real Estate Agents: CONTRACT OF EMPLOYMENT.** Where a landowner employs an agent to procure a purchaser for his real estate upon certain terms and conditions, the contract of employment need not be in writing.
3. ———: ———. Upon the facts proved, *held*, that the plaintiff had performed the contract on his part and was entitled to recover.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

Charles O. Whedon, for plaintiff in error, cited: *A. & N. R. Co. v. Washburn*, 5 Neb., 117; *Peet v. O'Brien*, Id.,

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362; *B. & M. R. Co. v. Lancaster County*, 7 Id., 37; *Jones v. Seward County*, 10 Id., 161; *Phoenix Ins. Co. v. Barnd*, 16 Id., 90; *Lloyd v. Matthews*, 51 N. Y., 124; *Fox v. Rouse*, 47 Mich., 558.

Harwood, Ames & Kelly, contra, cited: *Mechem on Agency*, sec. 616, and citations to note 2; *Ahern v. Baker*, 34 Minn., 98; *Vreeland v. Vetterlein*, 33 N. J. L., 247; 1 *Parsons on Contracts*, 71.

MAXWELL, J.

This is an action to recover commissions for procuring a purchaser for the real estate of the defendant.

It is alleged in the petition that "on or about the month of February or March, 1887, the defendant employed the plaintiff to find a purchaser for and to sell for the defendant the east half of the northwest quarter of section 35, town 11, range 6 east, in Lancaster county, at a price and upon terms stated and fixed by defendant, and agreed to pay the plaintiff for his service, and as his compensation for finding such purchaser and making said sale, the sum of \$600.

"About the 22d of April, 1887, this plaintiff found a purchaser, and sold to him for defendant the said premises at the price and upon the terms stated and fixed by the defendant, and thereupon the defendant became indebted to the plaintiff in the said sum of \$600 for his services in and about finding such purchaser and making said sale, and there is now due to the plaintiff from the defendant for such services and as his compensation for his services the sum of \$600, with interest thereon from the 23d of April, 1887."

To this petition the defendant answered as follows:

"Comes now the above named defendant and for answer to the plaintiff's petition herein denies each and every allegation therein contained.

"Second—And for a further and second defense said defendant alleges that the pretended contract, alleged by the plaintiff to have been made, was not made, executed, or delivered in writing, nor any memorandum thereof was ever made or signed by this defendant, nor yet by any one for him at any time by this defendant thereunto in writing or otherwise authorized by this defendant."

The plaintiff demurred to the second count of the answer, but the demurrer was overruled and a reply was then filed.

The overruling of the demurrer is now assigned for error.

The demurrer should have been sustained. The allegations of the petition are that "the defendant employed the plaintiff to find a purchaser" for the real estate described in the petition upon certain terms and conditions, and that he found such purchaser, etc. Such a contract need not be in writing.

On the trial of the cause the jury returned a verdict for the defendant, and a motion for a new trial having been overruled judgment was entered on the verdict and the action dismissed.

The testimony tends to show that one Van Horn was the agent of the defendant, and that the defendant owned a section of land in Lancaster county; that Van Horn requested the plaintiff to find a purchaser for the land; that the plaintiff found a purchaser for a quarter section thereof, and Van Horn, for the defendant, paid the plaintiff \$200 for selling that quarter. Van Horn then requested the plaintiff to find a purchaser for the other three quarter sections for a stipulated price and upon certain terms, and promised him \$200 as commission for each of said quarter sections if sold.

The following letter was introduced in evidence:

"MONROEVILLE, OHIO, February 27, 1887.

"*Mr. W. C. Griffith:* DEAR SIR—Yours of the 24th

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received. We would prefer that the notes should run the full time.

"I will be at Lincoln the last of this week or first of next and will bring the deed. The notes and mortgage can be made there if you conclude to have them made. As to selling the S. $\frac{1}{4}$ S. E. $\frac{1}{4}$ for \$40 per acre, I don't think we would sell at those figures. We will close out the section at \$50 per acre on same terms as given on S. W. quarter. I consider the south $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ the best 80 acres in the section and worth the most money. If you can close out the whole section at the price named we will give you \$300 in addition to the amount agreed upon for selling the quarter you have sold. You can sell in $\frac{1}{4}$ sections, but for the S. E. $\frac{1}{4}$ we should want \$80 per acre if sold separate.

"Yours truly, W. H. VAN HORN."

The testimony also tends to show that the plaintiff did find a purchaser for the land in question for the price and upon the terms and conditions mentioned. He thereupon telegraphed to Van Horn that he had found a purchaser for the land on the terms stated. To this he received a reply as follows:

"Too late; sold several days ago. Wait until get letter."

Griffith also wrote to him as follows:

"LINCOLN, NEB., April 23, 1887.

"*Mr. W. H. Van Horn:* DEAR SIR—I went to the records yesterday to see if there was anything of record there to show that the land ($\frac{1}{4}$ of 35, 11, 6) had been sold. Nothing appearing there I made the contract for the sale of the land and they paid me \$500 cash in hand and are to pay \$7,500 as soon as deed is executed, and the balance in five equal annual payments with interest at 8 per cent per annum. The parties to whom I sold recorded their contract and are quite anxious to have the deed executed. The parties to whom I sold are, W. J. Flemming, J. F. Hutchins and Ephraim E. Myers. These are the names

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to be put into the deed. Will you be out or will you send the deed to bank to be delivered? I think my sale is the one you should recognize, inasmuch as it is made strictly on your terms and is first of record.

"Hoping you will stand by my sale,

"I am, yours very truly,

W. C. GRIFFITH."

The answer of Van Horn is as follows :

"MONROEVILLE, OHIO, April 23, 1887.

"*W. C. Griffith:* DEAR SIR—Your telegram received last evening and a reply sent. Now, the facts are, I had a telegram some four days ago, before yours came, from Sherwin, Sherwin & Co., that the 480 acres were sold by them, and that they had written full particulars. I received their letter Thursday evening of this week and answered it yesterday, but did not confirm the sale. I refused to do so for reasons given them, until Mr. Woolworth and myself were there, which will be the last of next week. There is something given in the terms by them that we will not sanction, as they had no instructions to give any such terms. You had better hold to your sale until we come, and of course we will take the one that pays the most money down. We wish to reinvest all the money we get for property sold, and of course the more cash we get in a trade the more we will have to reinvest. Sherwin's trade pays \$2,500 cash, \$2,500 in 60 days, \$3,000 in 90 days, and the balance in 1, 2, 3, 4, and 5 years. Of course you know whether your terms are better for us than these, which I presume they are.

"I shall leave home Monday morning for Chicago and Lincoln. Intend to stop in C. about three days and get into Lincoln next week, Thursday or Friday. Mr. Woolworth and wife are coming there from Hot Springs, Arkansas, and he will probably be there by the same time. If your party wants the land bad enough to wait until we come,

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the chance is that he or they will get. The Sherwin parties must pay $\frac{1}{2}$ down to take it, which they do not offer now.

"This is confidential.

"Yours truly,

W. H. VAN HORN."

There are other letters in the record tending to show the liability of the defendant to the plaintiff, to which it is unnecessary to refer. The issue made by the pleadings in this case is simply whether or not the defendant had employed the plaintiff to find a purchaser for his lands upon certain terms and conditions, and whether, in fact, he had found such purchaser. In other words, a denial puts in issue the allegations of the petition.

Under such an issue no affirmative matter in defense can be shown; yet we find a large amount of evidence offered on behalf of the defendant, of an affirmative character, and not properly admissible, and the court gave the following instructions:

"If you find from the evidence that the defendant did employ the plaintiff to make the sale of said premises, and that the plaintiff made no sale of said premises until after the defendant had sold said premises to other parties, and had so notified the plaintiff, or the knowledge of said fact had become known to the plaintiff before making a sale of said premises, then your verdict should be for the defendant."

The giving of this was clearly erroneous. If the defendant desires to raise an issue as to a sale by another party he must plead such facts, and cannot try that issue under a general denial.

In the defendant's brief it is claimed that the plaintiff's agency terminated on a sale by another party. It is sufficient to say that no such sale is shown and that the telegram of Van Horn asserting that such sale had taken place was a mistake. Neither had the plaintiff's agency terminated, as Van Horn says to the plaintiff in his letter: "If your party wants the land bad enough to wait until we come

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the chance is that he or they will get it." This was a recognition of the continuing character of his agency.

The testimony tends to show that the plaintiff fully performed all the terms of the contract by him to be performed, and that the defendant, some time after the sale in question, but while holding onto it in case he could do no better, sold the land in controversy for about \$1,000 more than he had authorized the plaintiff to sell it for. This, however, will not relieve him from liability to the plaintiff. On the proof before us he is entitled to recover.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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PARIS R. HIATT V. MOSES P. KINKAID.

[FILED FEBRUARY 18, 1890.]

1. Malicious Prosecution: PROBABLE CAUSE: DAMAGES.

One A., having no grounds on which to form a belief of the guilt of the accused, charged in a complaint under oath before a justice of the peace that certain drafts belonging to him, amounting to \$3,627.19, were by "some person feloniously taken and carried away," and that he "verily believes that said property is now concealed by P. R. H. on his person in his dwelling house in which he resides, he knowing said property to have been stolen," there being no proof that the drafts were stolen or that the affiant had reason to so believe. A search warrant was issued and served on H., and the drafts in question produced, whereupon a writ of replevin issued at the instance of A. was levied thereon, and the criminal proceedings were thereupon dropped. In an action by H. against A. for malicious prosecution, *held*, that H. was entitled to recover damages, the amount being a question for the jury.

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3. A Verdict not having evidence to sustain it on a material point will be set aside.

ERROR to the district court for Antelope county. Tried below before POWERS, J.

O. A. Williams, and O. P. Mason, for plaintiff in error.

N. D. Jackson, and Allen Robinson & Reed, contra.

MAXWELL, J.

This action was brought in the district court of Antelope county by the plaintiff against the defendant, upon two causes of action: First, for alleged malicious prosecution; and, second, for the alleged conversion of certain drafts which it is claimed the defendant wrongfully converted to his own use.

The answer of the defendant is very long, but sets out in detail his version of the case, and that portion of it relating to the contract, drafts, etc., is as follows:

"Defendant admits obtaining the checks mentioned in plaintiff's petition, not in the precise manner stated, but in the manner hereinafter stated, and avers that he was, at the time of so obtaining said drafts or checks, the sole owner of them, and was entitled to the possession of the same, and the possession by plaintiff of said checks or drafts was unlawful, and plaintiff came in possession of said checks or drafts of defendant in the dishonest, fraudulent, and felonious manner, to-wit:

"Early in the summer of 1883 plaintiff induced defendant to make plaintiff his (defendant's) agent to buy cattle for him, and allow him to feed and fatten the cattle for him, whereby it was agreed by the parties, plaintiff and defendant herein, that the defendant was to have plaintiff, as his agent, buy about seventy-four head of extra fine steers, the same to be three and four years old, except a few extra two-year old steers might be bought.

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"Plaintiff was to perform the labor and devote the time necessary to buying and gathering said cattle, and to bear the expenses other than the cost price incident thereto, and was thereafter the collecting of the cattle at his home in Wheeler county, in this state, in the summer of 1883, to graze, feed, and fatten said steers, and make them fine beef cattle, ready for the market by the 1st day of June, 1884, and plaintiff was to feed said cattle corn and other food necessary to be used in fattening the same, and bear all expenses incident thereto, and to account to defendant, in money, for all cattle lost by him, and on the 1st day of June, 1884, defendant was to sell said cattle, and after he had first taken from the proceeds of said sale the original purchase price thereof, and a profit of 35 per cent, the balance of the proceeds of the sale of said cattle should be given to the plaintiff herein in consideration of his services and expenses hereinbefore mentioned. In pursuance of said contract defendant, by plaintiff, his agent, bought about seventy-six head of cattle and delivered them to the plaintiff to fatten, as above stated, which plaintiff undertook to do, but performed the same only partially.

"During the winter of 1883 and '84, in about the month of December, 1883, plaintiff failed to furnish the necessary food for said cattle, as he had agreed to do, and asked defendant to furnish food to feed said cattle until about June, 1884; whereupon it was then and there further agreed by and between plaintiff and defendant that defendant would furnish sufficient corn to feed or fatten said cattle; that when said cattle were sold by him, in addition to his first taking from the proceeds of said sale the original price of said cattle and the profits thereon aforesaid, he would also take, before plaintiff should have a part of said proceeds, the cost price of said corn or said food so furnished by him, the said defendant, to fatten said cattle, together with the amount of two promissory notes, of which the following are copies, to-wit:

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"\$50. O'NEILL, NEB., Nov. 20, 1883.

"One day after date, for value received, I promise to pay to the order of M. P. Kinkaid, \$50, payable at Holt County Bank, O'Neill, Neb., with interest at 10 per cent per annum.

"P. O., Clearwater, Neb.

"PARIS R. HIATT AND WIFE."

"\$100. O'NEILL, NEB., Nov. 26, 1883.

"One day after date, I promise to pay to the order of M. P. Kinkaid, \$100, payable at Holt County Bank, O'Neill, Neb., with interest at 10 per cent per annum.

"P. O., Clearwater. (No. 66.)

"P. R. HIATT AND WIFE."

"Said notes having been given to defendant by plaintiff for money borrowed, to be used in buying grain for said cattle, it then and there at the time of making said latter agreement having been agreed by plaintiff and defendant that the amounts of money for which said notes had been given should be considered as having been directly invested by defendant in corn to be fed to said cattle in the same manner and upon the same terms and conditions that he should, and was then and there about to, undertake to furnish corn to feed said cattle.

"In pursuance of said second agreement, defendant furnished corn to feed said cattle, which cost him at the market price and was worth \$500. The original cost price of said cattle to defendant was \$2,540, or about that amount, and the cost of the corn so purchased by defendant was \$730, with amounts said notes represent, and on the first of June, 1884, the day upon which said cattle were by agreement of plaintiff and defendant herein to be sold. The interest of defendant in said cattle was the value of the same to the extent of \$4,159, and the interest of the plaintiff in said cattle was the value of the same less \$4,159, which interest of plaintiff was secondary, conditional, and subject

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to the interest of defendant to be first realized as above set forth, and to the absolute exclusion, if necessary, of any interest of plaintiff.

"On or about the 25th day of May, 1884, the defendant, being the owner of said cattle, with the qualifications above mentioned, of the conditional interest of the plaintiff, and the plaintiff, designing and contriving to wrong and defraud the defendant, did unlawfully and wrongfully take seventy head of said cattle and convert the same to his own use and did embezzle the same for that, without the knowledge or consent of defendant.

"Plaintiff shipped seventy head of said cattle to the city of Chicago and sold the same and received for same sum of \$3,627.19 and plaintiff received as part payment of the above mentioned price of said cattle so sold by him the three checks or drafts referred to in his petition. Said defendant being financially irresponsible, and defendant knowing this and well knowing that a judgment against him for the amount of the value of defendant's interests in said cattle would be unavailing to protect himself against an entire loss of said investment, on the 29th of May, 1884, at the village of O'Neill, Neb., did ratify the sale of said cattle by plaintiff; and by reason of the fact that defendant was the exclusive owner of said stock to the extent of \$4,159 and that plaintiff had realized a smaller amount for the same than defendant's interest therein, and that said plaintiff had previously converted the other six head of cattle belonging to the defendant to his own use and never accounted to defendant for same (as hereinafter set forth), the defendant then and there thereby became the sole and exclusive owner of said checks or drafts referred to in said petition, the same then and there being in the possession of the plaintiff.

"On the 29th of May, 1884, at and in the county of Holt, aforesaid, defendant then and there being the exclusive owner of said drafts or checks and entitled to the

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immediate possession of the same and plaintiff then and there being wrongfully and unlawfully in the possession of the same, the defendant demanded of plaintiff that he deliver up to him said checks or drafts, which the plaintiff refused to do and ran away; whereupon the defendant then and there immediately swore out a search warrant and placed the same in the hands of the sheriff, the following, as to words, figures, writing, print, and erasures, being a *fac simile* of the complaint upon which said search warrant was issued, to-wit:

“THE STATE OF NEB., HOLT Co.:

“The complaint of M. P. Kinkaid, of said county, made before me, John P. O'Donnell, a justice of the peace in and for said county, who, being first duly sworn, deposes and says: That on or about the 29th day of May, 1884, in said county, the following described property of M. P. Kinkaid, to-wit, checks and drafts made payable to the order of Hiatt and Kinkaid, drawn by firms in Chicago, Ill., amounting to \$3,627.19, or about that amount, that said property belongs to affiant, M. P. Kinkaid, was by some person feloniously taken and carried away from said O'Neill City, in said county. Affiant further says that he verily believes that said property is now concealed by P. R. Hiatt in his dwelling house in which he resides, he knowing said property to have been stolen.’”

It is unnecessary to notice the reply.

On the trial of the cause the jury returned a verdict for the defendant, upon which judgment was rendered.

A large number of errors are assigned, the more important of which will be noticed in their order.

The original contract of the parties is contained in the following letters:

“*Mr. Kinkaid:* SIR—Yours of the 2d and 7th just received. In reply I will say that we need a contract or bargain signed by both of us. I am ready for business as

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soon as you make out your papers authorizing me to buy as your agent for such part of the profits as is named—all profits above 35 per cent in figures; steers kept one year and sold fat. Yours truly, PARIS R. HIATT."

"O'NEILL CITY, NEB., 5-28-'83.

"*P. R. Hiatt, Esq.*: DEAR SIR—Unexpectedly I was away from home all of last week but one day, which circumstance prevented my sending to begin with as I had written to do. I sent you, by mail, a check book and some blank bills of sale. Take a bill of sale for each lot that you buy, and send them to me as it becomes convenient. My understanding now is that you buy, take care of and fatten the cattle, pay all damages caused by cattle trespassing upon the property of others, and that I pay you for the same all profits to me over and above 35 per cent net profit. With this understanding you may begin to buy and check out funds, and to pay for the same as you buy.

"Return this sheet to me by return mail, signifying your acceptance of these terms. The cattle are to be ready for the market by about June 1, 1884, but may be sold previously if the prospects seem to demand it for our mutual interests. Write your acceptance herein and return it by return mail. Yours truly, M. P. KINKAID."

The letter or postal card, and to which the above letter is an answer, was written in May, 1883 but the exact date does not appear. They together constitute the contract in this case.

In order to understand this proposition and answer fully it is necessary to consider some of the correspondence leading up to it and in connection therewith.

In April, 1883, Hiatt sent to the defendant the following letter :

"CLEARWATER, NEB., 4/3/83.

"*M. P. Kinkaid*: SIR—I would ——— much to buy cattle ———. This year will buy the ——— in your

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name and give you security that will insure you against all losses that might occur from depreciation or poor judgment in buying, or anything else which might cause a loss, for all profits over 35% of the money used; or, if you rather, I will give $\frac{1}{2}$ the profits, which, no doubt, would make you 100%, but I would not insure; but I think that I can buy and sell several lots of cattle during the year which would be very profitable to both of us and would rather do so. I have found out where I can buy so as to make 75% between now and July without much risk, if any.

"If you would like in any shape, please state me the particulars, or, if you would like to see me, the man that is intending to make us the loans on real estate lives at Albion; I think that he will get it fixed soon and then we can pay you the balance. Many thanks to you for past favors. You will have all our good wishes and it will do you no harm and all the good it can.

"Yours truly, PARIS R. HIATT.

"——— Re."

The loans referred to relate to debts apparently secured by chattel mortgage which the plaintiff was owing the defendant prior to the transaction in suit. In answer to the above letter the defendant wrote as follows:

"*Paris R. Hiatt*: DEAR SIR—Yours of the 10th before me and I enclose thereof a written contract signed by me, which, if it suits you, you may sign and copy and return it to me or you need not copy it and I will copy it, sign the copy and send it to you. Your first offer was to allow me \$1,200 for the use of \$2,400, or 50% for the use of my money; you next wrote you would insure me 35% or give me $\frac{1}{2}$ of the profits, whichever I choose, that the latter might make me 100%.

"I prefer to go into the matter as a speculator rather than as a money loaner and have written up the contract to have $\frac{1}{2}$ of the profits; you are better posted on what is

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customary than I, and know better whether this is fair—at any rate this is your offer.

“Yours truly, M. P. KINKAID.

“P. S.—What kind do you expect that you will buy, mostly two or three years old? Write at once, as I want to go away on business.”

This proposed contract was returned by Hiatt without his signature.

There is also a letter as follows:

“AUGUST 3, 1883.

“P. R. Hiatt, Esq., Clearwater: DEAR SIR—Your card is before me. I meant you to understand when I met you at Clearwater, not to buy any more cattle at this time, but it seems that you did not so understand me. Buy no more until again authorized to do so. I instructed the bank several days ago that no more checks would be sent in, but will have them pay this one for \$35. If Warner has not accepted the check now he need not accept it at all. He has no right to hold a check several weeks and speculate on prices.

“I want no more cattle now at any price and will buy no more until prices have become settled. The best judges say that prices have declined fully one-third.

“Acknowledge receipt of this and oblige,

“Yours truly, M. P. KINKAID.”

Also a receipt dated 8-19-'83, as follows:

“O'NEILL, HOLT CO., NEB., 8-19-'83.

“Received back from Paris R. Hiatt one certified check for \$205, of Holt Co. Bank, signed by M. P. Kinkaid, the same unused.

M. P. KINKAID.

“I hereby release all claim to one pony, branded O. K. on left hip, to P. R. Hiatt, in consideration of \$75 hand paid, August 19, 1883.

M. P. KINKAID.”

Also the following letters from the plaintiff:

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"CLEARWATER, NEB., 4-27-'83.

"*Hon. M. P. Kinkaid*: DEAR SIR—Yours of 22d and 23d received. In reply say that I don't think but what I can get plenty of 2 at \$25 and 3 year old steers at \$35 of a good quality. About three weeks back there has been a great rush for steers, but it is over now to a great extent, as buyers became discouraged, so I think that the market is weakening considerable. My object is not to rush, but do considerable hunting around, get them as much below the market as possible. Anything well bought is half sold. Corn 20c per bu. I don't know, but I think about the 10th of May would be a good time to commence buying. I can handle 200 head of steers if you want to invest that much. I can pay you what I am owing next week if you are anxious. * * * Yours truly, PARIS R. HIATT."

"CLEARWATER, 7-18-1883.

"*Hon. M. P. Kinkaid*: SIR—I have bought cattle per bills enclosed. The horse that I paid \$60 for I put in on the yoke of oxen, and the bull and the 3 year old steer, valued at \$175, the check for \$60 finished paying; then my horse's back gave out and I was compelled to buy another which cost \$75, is more than worth the money. I will replace soon in cattle or cash. The steers that I have bought are extra good so far, and I have got them for less than three cents per pound. The cattle up west are considerable better quality than they are east, and I can get them cheaper. I could have bought 10,000 head before now, of course, but it has been a downward market all the time, and I am aiming to make 20% on the purchase; I have the promise of about all that I want at figures I can stand.

"Those bills of sale drawn in my name were on account of the men wanting their bargain with me and would not sign any other way. I acknowledge the property yours and for your use and benefit, and only used my name for convenience. Yours truly, PARIS R. HIATT."

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And under date 3-15-'84, a letter which concludes as follows:

"I am so sorry that you cannot come down to see the cattle. I hate to ask you for money to buy corn and carry on my business with the cattle when you do not know how things are. I do not feel like asking you to take my word for everything as you are doing.

"Please send Mr. A—— or some one to see that matters are all right. I consider myself trustworthy in ordinary matters, but this is certainly something that I think you had ought to have attended to long ago. I would not have trusted any man on earth so much and so long. I will be at home Monday, 17th. Tuesday I have to go to court.
Yours truly, P. R. HIATT."

Also a letter dated Neligh, 3-10-'84, as follows:

"*Hon. M. P. Kinkaid*: SIR—I have sold or bargained to sell one car of the tail of the steers at a good price; they will come to a little over 50 per head; the rest is worth 75. I can contract them to the same men for 6 cents; feed out will be \$90 per head. I want you to go to Clearwater to-morrow morning, Tuesday. Messrs. Penn and Russell will meet you there and take you to my house. Be on time with both feet.

"Yours truly, P. R. H."

This sale does not appear to have been completed.

Also letter dated Clearwater, 5-21-'84, as follows:

"*Hon. M. P. Kinkaid*: SIR—I am now compelled to ship cattle; will load 23 afternoon. I suppose that it will be all right to order money returned to Holt Co. Bank, O'Neill. I am sorry I could not hold until for three weeks. I could not trade with Harr; he said that the cattle would not net over \$4,000. I think \$5,000. They look very good now; one-half of them will not be considered only fair cattle, but one-half will be good shipping cattle if I make a quick trip. Mr. O. Phillips will assist

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me through and in selling. Will consign 2 cars to Patterson Bros., 2 cars to Scott and Amos. I want to make competition so as to get good price.

"Yours truly, PARIS R. HIATT."

There is also a telegram from the railroad agent at Clearwater to the defendant as follows:

"THE WESTERN UNION TELEGRAPH CO.

"CLEARWATER, NEB., 26, 1883.

"*M. P. Kinkaid, O'Neill*: Consigners, Hiatt and Kinkaid; cars 39, 31, and 749 consigned to Scott and Amos, and cars 30, 71, and 597 to Patterson Bros.

"T. R. HALDERMAN."

The defendant telegraphed to the consignees of the stock at Chicago and received the following telegrams in answer thereto:

"THE WESTERN UNION TELEGRAPH CO.

"Received 10:40 A. M., May 27, 1884.

"Dated UNION STOCK YARDS, ILLS., 27.

"*To M. P. Kinkaid, O'Neill*: Chicago drafts given for net proceeds in names as billed. SCOTT AND AMOS."

"THE WESTERN UNION TELEGRAPH CO.

"Received at 10:40 A. M., May 27, 1884.

"Dated UNION STOCK YARDS, ILLS., 27.

"*To M. P. Kinkaid*: Sold yesterday; gave checks to Hiatt, order of Hiatt and Kinkaid, No. eighteen thirty-six. PATTERSON BROS. & CO."

On the 29th of May, 1884, the plaintiff returned to O'Neill with the drafts for the cattle. Two of these drafts, which in the aggregate amounted to \$2,836.07, were taken in the names of Hiatt and Kinkaid and payable to their order, and one of said drafts, calling for \$750.12, was payable to the order of P. R. Hiatt.

The plaintiff in his direct examination, after stating his arrival at O'Neill, testifies as follows: "I met him [Kin-

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kaid], and shook hands with him, and he said, how did you get on; I said, not as well as I expected; I struck a bad market, and I pulled out the statements from the commission men, what the cattle had brought, and I handed them to him. He asked me if he could keep them over night; I told him that he could keep them over night and keep them always if he wanted to. He said that he had been out in the country that afternoon and he presumed that I was tired—I was not feeling very well; he said that I had better go back to the hotel and stay all night and come back the next morning. I did not feel very well, my health was poor, and I went to the hotel. I stayed all night. The next morning I went back to the office three times—three times I went back. There are three rooms in the office, in this shape (the witness illustrating to the jury by drawing with his finger on the floor). There was a room that you went into first, then there was a middle room, and then there was a back room. Mr. Adams was in the office and he said that Kinkaid had not got up yet, and I think that I went into the middle room and Kinkaid did not have his clothes on yet. When he had got his clothes on, he took a chair and sat down by the table and I sat down too, and he said, let me see those drafts or checks—I believe that he called them checks, and that he said checks—and I said to him that I wanted to settle, that I wanted to see what he had that belonged to me, my checks that I had got in the Holt County Bank, and he said to me, you shipped those cattle in a firm name that never existed and you had no right to do so, and he says, hand me out those checks, and I refused to do it. I did not like that kind of a way of settling up. I don't exactly know what was said, he seemed to be mighty angry at me, and then he says, hand out those checks like a man, you agreed to be a man, now hand them out, and I refused to do it. He then said he would arrest me if I did not."

On that point the defendant testifies as follows:

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A. It was the latter part of May—I would not say the exact day.

Q. Where did you meet him when he returned?

A. I met him in my office one evening about sun-down, or possibly it was after sun-down.

Q. And that was at O'Neill?

A. Yes, sir.

Q. Did Mr. Hiatt at that time give you any statements or papers as to the sale and the proceeds of the cattle?

* * * * *

Q. What conversation did you have at the time Mr. Hiatt gave you these statements marked Exhibits Nos. 32 and 33, the statements from the commission men?

A. We were together but a short time that evening; I asked him how he got along and he produced these statements, and I was just going to call on him for the checks, he turned around on his chair and wanted to know if I was sick; I told him that my health was good; he said that he was sick and tired, and that he would like to go to the hotel, and he wanted to know if it would not suit just as well to fix it up the next morning; I told him that it would; he said that he was going to leave on the train the next morning, and the train went east at 9 o'clock. My recollection is that I told him to come around before breakfast and I would wait for him and fix it up before I went to breakfast; then he went away.

Q. Did he stop at the same hotel with you that night?

A. I was not stopping at the hotel then.

Q. The next morning he came around?

A. Yes, sir.

Q. You may state what was done and said the next morning, how the conversation opened up, what was said and done by each party.

A. He said "Good morning," when he came in, as usual, and I received him as usual, and I sat down at the table and laid these two statements before me—he stood

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up most of the time—and then I asked him for the exchange.

Q. What do you mean by the exchange?

A. His drafts, the proceeds of the cattle.

Q. Well, did he say anything?

A. He wanted to see how we stood first; he wanted his pay for the feeding of the cattle; that he had worked hard in taking care of them, and I think that he said that it was worth or had cost him as much as \$1,500; that his wife had worked hard in taking care of the cattle; and I said to him, "If you wish me to be generous or charitable with you, give me the checks and it will be time enough afterwards." He said that he would not do so; he insisted that he wanted his pay for feeding the cattle.

Q. What did he claim at that time; what did he want you to do before he delivered the checks?

A. Pay for feeding the cattle.

Q. Was anything said that he wanted to figure up and find out how much he owed on the notes and checks?

A. There was not a word said about the notes or checks; he wanted to figure up and see how much was coming to him for feeding the cattle.

Charges of fraud are made against the plaintiff in the briefs of the attorneys for the defendant without any evidence to sustain them. It is asserted that the plaintiff shipped the cattle without the knowledge of the defendant, but the proof shows that he was notified not only by the plaintiff, but by the agent of the railroad company. The cattle seem to have been shipped in pursuance of the contract made May 28, 1883, to hold them one year, and there is no claim, or at least no proof, that the plaintiff did not make as good a sale as the market would justify.

The testimony shows that the corn to feed the cattle was exhausted; that the plaintiff some time before had notified the defendant that it would be necessary to purchase more corn, and that it was desirable to keep the stock a few

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weeks longer. The defendant, however, seems to have paid no attention to these requests. Being without feed to continue the fattening of the cattle, it is difficult to perceive what else the plaintiff could have done, except to send them to market; otherwise they would have depreciated in value from loss of flesh.

Under the circumstances, therefore, the plaintiff seems to have pursued a course which would conserve the interests of both parties. It may be said, however, that he had agreed to furnish feed for the stock and that his failure to do so was a breach of his contract. We do not understand the contract to require him to furnish corn at his own expense.

He testifies that he fed all that he had on his farm—about ninety acres—and then requested the defendant to let him have money to buy corn, which he seems to have done. This was a joint enterprise; the defendant entered into it as a “speculator” and not as a money lender.

The proposition of the plaintiff was to give him thirty-five per cent of the profits. This was accepted by the defendant with the understanding that he was to have thirty-five per cent of the “net profits.” The cattle evidently were not to be bought at one purchase, but the plaintiff was to go around the country and pick up one here and there where it could be bought to advantage, and necessarily must incur some expenses. These, we think, are the expenses referred to and not the cost of the grain necessary to fatten the stock. Such cost forms a very large and important item in fattening stock, and no doubt would have been expressly agreed upon if intended to be paid solely by the plaintiff. That question, however, probably is not material in this case at this time.

It is evident that two of these drafts, aggregating more than \$2,800, were intended for the defendant and would have been delivered to him on a settlement of the accounts between the parties. There is testimony in the record

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tending to show that fat steers in the spring of 1883 found a ready market in Chicago at a very high price, while corn in the vicinity of the parties to this action was worth but twenty cents per bushel, and that at the comparative prices of corn and beef cattle there was a very large profit in fattening steers.

The testimony also tends to show that during the summer of 1883 there was a very considerable decline in the prices of fat stock, and that in consequence thereof the defendant had notified the plaintiff to cease purchasing. The stock in question seems to have been purchased at a fair price as prices were then current, although in a declining market. The corn that the defendant furnished was charged to the plaintiff's account, and it would seem but justice that the corn furnished by the plaintiff should be charged to the general account also, and paid for before dividing the surplus. The plaintiff, therefore, in attempting a settlement with the defendant said to him, in effect, that the enterprise had proved unprofitable and that he wanted a settlement of the account between them, claiming that he and his wife expended about \$1,500 on the stock. It is probable that this would have been reduced considerably had an accounting been had, but of this we do not know.

A request for a settlement, so far as we can see, was a reasonable demand. The defendant had gone into the enterprise as a speculator. This implies that he took his chances of the venture proving a success. If it did not do so—if there were losses, then they must be borne by one or all of the parties engaged in the matter. Here were losses; that is, the cattle had not sold for as much money as they had cost, together with the cost of the corn that had been used to fatten them.

Suppose one-half of the cattle had died without negligence on the part of the plaintiff, it is pretty evident that the loss of such cattle would have fallen on the defendant. Here, however, is a loss for the value of the food used to

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fatten the stock, and this loss must be apportioned between the parties.

There were other matters to adjust.

Thus: seventy-six head of stock were purchased. Of these, seventy head were shipped to Chicago, six head were disposed of in various ways, the title to one after considerable litigation had failed, and but little was realized from the six. The possibility of loss does not seem to have been considered by the parties at the time of making the contract, but like all transactions where success depends upon the vicissitudes of climate, markets, health, etc., disappointment is liable to be the result in place of profit. Therefore, if the defendant is given the benefit in argument of all that he claims to have paid out for the cattle and corn, viz., \$3,390, he was not entitled to all these drafts. It is probable, too, that these amounts claimed by him will be somewhat reduced on a final settlement.

The plaintiff was met with an absolute denial of settlement on the part of the defendant and a demand for the drafts as his own. Failing to obtain them in this way the defendant instituted a criminal charge against the plaintiff, "that the following described property belonging to M. P. Kinkaid, to-wit, checks and drafts made payable to the order of Hiatt and Kinkaid, drawn by firms in Chicago, Ill., amounting to \$3,627.19, or about that amount, that said property belongs to the affiant, M. P. Kinkaid, was by some person feloniously stolen, taken, and carried away from O'Neill City, in said county.

"Affiant further says that he verily believes that said property is now concealed by P. R. Hiatt on his person in his dwelling house in which he resides, he knowing said property to have been stolen."

There is no testimony in the record tending to show that the drafts in question had been stolen, or that the defendant had any reason to so believe. So far as the record before us shows, the charge was a rash assertion under oath, and

there was no attempt to sustain it by proof of the specific act charged.

The testimony shows that the search warrant and writ of replevin were both in the sheriff's hands at the same time; that the plaintiff was taken to the office of the justice, and he then demanded to be permitted to see an attorney, which was refused; that there, in the presence of the justice, the sheriff, and the defendant, he was partially stripped, and the draft for \$750 and about \$40 in money found on his person; that he thereupon was taken to a bedroom and stripped nearly naked, and the drafts to Hiatt and defendant found in the lining of his overalls.

No one can read the testimony in this case without being convinced that the criminal prosecution was instituted for the sole purpose of getting possession of the drafts in question. The whole course of procedure, both before and after the arrest, shows this to be the case. The drafts, when found on the person of the plaintiff herein, were levied upon under a writ of replevin in an action instituted by the defendant. Having thus obtained possession of the drafts the criminal charge was permitted to lapse. It is true the defendant pleads as an excuse for so doing that he was called away on professional duty, and therefore could not be present to prosecute, but it is evident that the real reason was a want of proof to establish the charge. The charge of felony against any person is of a very grave character, and should not be made unless there is a probable cause for making the same. The charge may cast a cloud upon the good name and reputation of a person that long years of exemplary conduct will not wholly efface. To justify the charge, therefore, there must be probable cause.

As stated by GANTT, J., in *Turner v. O'Brien*, 5 Neb., 544: "The defendant, however, may show the existence of probable cause, the absence of malice, or that he acted under an honest belief that the plaintiff was guilty of the offense with which he was charged, but this belief must

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have been founded on such reasonable grounds and circumstances as would have induced a man of ordinary prudence and discretion to believe in the guilt, and expect the conviction of the person charged with the crime.

"Therefore, the essential elements which constitute grounds of defense, in an action for malicious prosecution, are absence of malice, and honest belief in the guilt of the person charged, and a 'reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person is guilty of the offense with which he is charged.' And these last two elements must unite, for good faith, merely, may be based upon mere conjecture—it may be founded upon mere suspicion, unsupported by any act or circumstance tending to show that the accused is guilty, and, hence, belief itself will not protect the prosecution from liability."

The criminal law of the state is to be used on behalf of the people for the purpose of punishing crimes and thus preventing as far as possible the violation of the law. It is not a weapon to be placed in the hands of a private individual to enable him to accomplish his own private ends—more particularly to thereby collect claims in his favor. For such purposes the Civil Code has placed all the remedies known to the law at the disposal of the creditor. If, however, in disregard of the rights of a party he institutes criminal proceedings against him without just cause and as a means of accomplishing a private purpose, he will be liable for the consequences thereof. As no probable cause is shown, the plaintiff was entitled to recover damages in his action for malicious prosecution, the amount being a question for the jury.

Some objection is made to the complaint, that it fails to state an offense. We do not deem it necessary to discuss that question, as by this means the defendant intended to and did procure the arrest of the plaintiff and searched his person and obtained the drafts. Until there is an account-

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ing between the parties the proof fails to show that the defendant was entitled to the draft for \$750.

It is true the title of the cattle was in him, but merely as security for the purchase price, only in the nature of a mortgage, and both parties had an interest in the stock, the amount of which can only be determined on the settlement of the accounts. In such settlement or adjustment of the balance between the parties the defendant cannot preclude any defenses in favor of the plaintiff which would have been available to him in an action for an accounting; in other words, he can gain nothing by his wrongful procedure in the case. The plaintiff claims to have purchased the stock in question of the defendant in August, 1883, for about \$3,000. This, however, is denied by the defendant and will not be considered. The proper procedure on the part of the defendant would have been to file a bill for an accounting against the plaintiff and enjoin him from transferring the drafts in question. No doubt upon a proper showing a court of equity having a party within its jurisdiction would require him to deliver up to the clerk of the court, or other person, any valuable papers in his hands which were liable to be misused or mislaid, and would enforce its order, if necessary, by imprisonment. The accounts between the parties could then have been adjusted and the drafts applied in satisfaction of the decree.

If it is objected that such process is necessarily slow and the creditor is compelled to wait for his money until the final decree, the answer is that this is the remedy the law gives. The courts are continually open, and every person for an injury to his property, person, or estate, has a remedy by due course of law, and these remedies are open, if the facts will justify their use, to every person having business relations with another. If the parties cannot agree, the courts necessarily must determine what their respective rights are and judge between them.

It may be said that this course was attempted in *Kin-*

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kaid v. Hiatt, 24 Neb., 562. In that case, however, it appeared that the plaintiff therein had, by means of a search warrant, obtained the drafts on the person of the defendant, whereupon he caused them to be levied upon under an order of replevin. He thereupon brought a bill of peace to enjoin the trial of the action of replevin and actions brought against him by Hiatt.

The court held rightly, we think, that such an action could not be maintained; but that was very different from an action for an accounting. In that case the plaintiff therein, having obtained the drafts in dispute, sought to retain them and have the courts sanction the unlawful methods taken to accomplish the result and prevent a trial of the very issues raised by himself.

The evidence wholly fails to support the verdict and the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

FREMONT, E. & M. V. R. Co. v. HOLT COUNTY.

[FILED FEBRUARY 18, 1890.]

1. **TAXES: PAYMENT: OFFICER NOT AUTHORIZED TO COLLECT.**

Before the organization of Brown county it was attached to Holt county for election, judicial, and revenue purposes, and in June, 1883, Holt county levied taxes upon all property in Brown county. Before such taxes became due, however, viz., September, 1883, Brown county was duly organized and elected county officers and thereafter transacted county business at the county seat of the latter county, and the authority of Holt county over it wholly ceased. The taxes upon the plaintiff's property, however, were carried on its tax rolls, although a copy thereof of property in Brown county had been obtained by the duly elected

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officers of that county. When the taxes on the plaintiff's property became due they were paid to the treasurer of Holt county, who placed the same in the county treasury. In an action to recover back such taxes, *held*, from the statement of facts in the petition, that the payment was made to a public officer under color of his office, but whose authority to collect the taxes in question had ceased, and that the money so paid could be recovered back.

2. ———: ———. The question of a voluntary payment of illegal or doubtful taxes does not arise in the case.

ERROR to the district court for Antelope county. Tried below before POWERS, J.

John B. Hawley, for plaintiff in error:

The money sued for belonged to Brown county, not to Holt. (*F., E. & M. V. R. Co. v. Brown County*, 18 Neb., 518.) A distinction is to be made between an irregular tax and one absolutely illegal. The tax in this case was illegal. (*F., E. & M. V. R. Co. v. Brown County*, *supra*.) Its payment was not voluntary (*Foster v. Pierce County*, 15 Neb., 50; *Roberts v. Adams County*, 20 Id., 411); and may be recovered back (*Mayor, etc., v. Riker*, 38 N. J. L., 225; *Peyser v. Mayor*, 70 N. Y., 497). Sec. 144, ch. 77, Comp. Stats., providing that illegal taxes may be enjoined, in no way impairs the right to recover after payment.

E. W. Adams and *M. F. Harrington*, *contra*:

Taxes paid on an illegal demand may be recovered back only when payment was made through fraud, duress, or mistake of fact. (*U. P. R. Co. v. Dodge County*, 98 U. S., 543; *Phillips v. Jefferson County*, 5 Kan., 415; *Wabaunsee County v. Walker*, 8 Id., 431; *Elston v. Chicago*, 40 Ill., 514; *Benson v. Monroe*, 7 Cush. [Mass.], 125; *Clarke v. Dutcher*, 9 Cow. [N. Y.], 674; *Mays v. Cincinnati*, 1 Ohio St., 268; *Powell v. Board, etc.*, 46 Wis., 212.) In *F., E. & M. V. R. Co. v. Brown County* defendant in error was not a party and is not bound by the *dicta* in that case. In

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the Nebraska cases cited, by counsel for plaintiff in error, all that is said is that taxes paid under a mistake of fact may sometimes be recovered. In the other cases cited, the assessments were void, which was not true here. The company's mistake was as to who was entitled to receive payment, which was a mistake of fact—not of law.

MAXWELL, J.

This is an action against Holt county to recover the sum of \$2,892.26 taxes paid under a mistake. A demurrer to the petition was sustained in the court below and the action dismissed. It is alleged in the petition, in substance, that prior to September, 1883, Brown county was attached to Holt county for election, judicial, and revenue purposes.

"That in pursuance of the provisions of section 40 of said statute last aforesaid, after said return was made by the plaintiff to the auditor of public accounts, the state board of equalization of said state of Nebraska returned and assessed the value per mile of said railroad of plaintiff so returned to said auditor; and on or before the 15th day of May, 1883, the said auditor certified to the clerk of the said county of Holt the assessment per mile of said state board on said railroad, and the said mileage of said railroad in said Holt county and in said territory which now comprises the county of Brown, and said assessment of said railroad in Holt county and in the territory now comprising the county of Brown was received by said county clerk of Holt county from said state authorities for taxation, the said territory embraced in what is now the county of Brown being then still attached to Holt county for revenue purposes.

"That the county commissioners of the county of Holt, on the 14th day of June, 1883, and while the said county of Brown was still attached to said county of Holt for revenue purposes and unorganized, duly levied taxes upon all of the taxable property in said county of Holt, and upon

all of the taxable property included in said territory, which now comprises the county of Brown, including taxes upon the assessment made by the state board upon plaintiff's railroad in said county of Holt, and in said territory now comprising the county of Brown, and all assessments made for the year 1883, upon all property for taxation in Holt county and in the territory now embraced in the county of Brown (excepting the plaintiff's said railroad assessed by said state board), were made by assessors elected or appointed in said Holt county.

"That the said county commissioners of the county of Holt, in making said levy of taxes for the year 1883, levied a state tax of $6\frac{1}{2}$ mills, a county tax of 14 mills, and school taxes (certified up to the county clerk of Holt county by the several district boards), upon the assessed valuation of the plaintiff's road in Holt county, and in the territory attached thereto as Brown county, as well as on all other taxable property therein; that the total county taxes thus levied by the county commissioners of Holt county on the assessed valuation of plaintiff's railroad in said territory now comprising the county of Brown amounted to the sum of \$2,892.26; that the said county taxes thus levied by the commissioners of Holt county on the plaintiff's railroad in the territory now embraced in Brown county were carried out on the tax books of Holt county against said plaintiff's property, and the same delivered to the treasurer of said Holt county for collection as by law provided, with the warrant thereto signed by the county clerk of said county, commanding the treasurer of said county of Holt to collect the same as by law provided.

"That on or about the 24th day of April, 1884, the said county taxes so levied by the county of Holt on the plaintiff's said property in the county of Holt, and in the territory now comprising the county of Brown, being due, the said tax lists being in the hands of the treasurer of said Holt county for collection, the plaintiff paid into the treas-

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ury of Holt county on said day, in good faith, said taxes so levied upon the said railroad in Holt county, and in said territory now embraced in the county of Brown, and paid all taxes assessed and levied on its property for the year, in said territory aforesaid, and received a receipt from said treasurer of Holt county therefor; that the county authorities of Brown county never at any time levied any taxes whatever upon any property in said county of Brown for the year 1883, and never levied any tax for said year on said railroad of plaintiff in said county of Brown, and said county of Brown was not organized at the time when by law the counties in said state of Nebraska are required to levy the taxes, but the taxes on all the property subject to taxation in said territory now comprising the county of Brown were levied by the proper authorities of Holt county.

"That immediately after the permanent organization of said Brown county, and in the month of August or September, 1883, the county clerk of said county of Brown obtained from the tax books of Holt county a transcript of the said tax list or tax roll for the said year 1883, of all the taxable property within said Brown county, including the said property and railroad of this plaintiff, and filed the same in the office of the treasurer of said county; the said tax list being the taxes levied and carried out on plaintiff's property by the county authorities of Holt county aforesaid."

In *Welton v. Merrick County*, 16 Neb., 83, it was held that a voluntary payment of taxes cannot be recovered back, and, therefore, where certain railroad lands purchased by the plaintiff were not patented when the taxes were levied thereon, it did not authorize the bringing of an action to recover back such taxes; in other words, the railway company was the equitable owner of the lands, having constructed the railroad as required by the act of congress, and

done everything entitling it to a full title to such lands except to pay certain expenses in entering the same.

Justice seemed to require that the lands should be taxed and no mere technical objection should be permitted to defeat that right. A purchaser, therefore, who voluntarily paid taxes thereon, in effect admitted the justness of the taxes, and having paid the same, would be concluded by his act.

In *Foster v. Pierce County*, 15 Neb., 48, and *Bates v. York County*, Id., 284, it was held that taxes voluntarily paid could not be recovered back, and those cases, in our view, state the law correctly and will be adhered to.

They have no application, however, to the case at bar.

If the facts stated in the petition are true, Holt county, in 1883, acting under authority conferred on it by statute, levied taxes on the plaintiff's property in Brown county, but before the time to pay such taxes had arrived, Brown county was duly organized and had elected officers, including a treasurer to transact its business, and was, in fact, transacting its own business. This being so, the authority of Holt county over the affairs of Brown county had wholly ceased. (*F., E. & M. V. R. Co. v. Brown Co.*, 18 Neb., 525; *Morse v. Hitchcock Co.*, 19 Id., 567.) The case, therefore, is like that where payment has been made to an agent whose authority had ceased. Such payment in an ordinary case cannot be pleaded as a defense, and was not such of the taxes in question.

The rule is well settled that money obtained from third persons by public officers illegally but under color of office may be recovered back. Here the treasurer of Holt county had apparent authority to collect the taxes in question, although such power had in fact ceased.

Acting upon this apparent authority he collected the taxes in question and applied them to the use of Holt county. It is not a case where the taxes themselves were illegal or even questionable, but where an officer, whose power had

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ceased, by virtue of his office collected and applied the taxes in question to the benefit of Holt county (Story on Agency, sec. 307; *Barnes v. Foley*, 5 Burr. [Eng.], 2711; *Frye v. Lockwood*, 4 Cowen, [N. Y.], 454; *Tracy v. Swartwout*, 10 Pet. [U. S.], 80; *Elliott v. Swartwout*, Id., 137; *Ripley v. Gelston*, 9 Johns. [N. Y.], 201); and it will not prevent a recovery that the payment was made under a misconception or a misconstruction of the law by both or either of the parties (Story on Agency, sec. 307; *Barnes v. Foley*, 5 Burr., 2711; *Tracy v. Swartwout*, 10 Pet., 80; *Elliott v. Swartwout*, Id., 137; *Ripley v. Gelston*, 9 Johns., 201). The petition therefore states a cause of action which entitles the plaintiff to the relief prayed for.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

STATE, EX REL. W. S. MCKINNEY, V. L. B. PARTRIDGE.

[FILED FEBRUARY 28, 1890.]

1. **Cities of Second Class: JUSTICES OF PEACE.** Under the provisions of an act to amend section 7 of chap. 26, Comp. Stats., approved March 21, 1889, a city of the second class in counties under township organization may elect two justices of the peace in each ward of the city.

ORIGINAL application for *mandamus*.

Bowen & Hoepfner, for relator.

John A. Casto, contra.

MAXWELL, J.

This is an application for a *mandamus* to compel the defendant, who is county clerk of Adams county, to issue a certificate of election to the relator as justice of the peace. He alleges in his petition that he is a qualified elector of the city of Hastings; that "the city of Hastings is a city of the second class having more than 5,000 inhabitants, and is governed by the laws of the state of Nebraska applicable to such cities; that the respondent herein is the county clerk of Adams county, and whose duty it is, among other things, to issue, under the seal of said county, certificates of election to the different persons elected to the several county, precinct, and township offices at the general elections held in said county; that the general election held in said city and county aforesaid, on the 5th day of November, 1889, among other offices to be filled and voted for at said election, was that of two justices of the peace for the district comprising the city of Hastings, in said county, and at which said election as aforesaid, the following named persons were voted for for said offices of justices of the peace in said city, to-wit: E. Hoeppner, A. C. Moore, C. W. Pease, W. S. McKinney, R. R. Morledge, U. S. Rohrer, N. B. Vineyard, J. C. Williams, F. M. Alexander, Jacob Wooster, and George Haller; that on the — day of November, 1889, said votes, among the other votes cast at said election, were duly canvassed by the canvassing board convened for such purpose; and by which canvass it was ascertained that the vote for justices of the peace resulted as follows, to-wit:

E. Hoeppner received	256 votes
A. C. Moore received	188 "
C. W. Pease received.....	64 "
W. S. McKinney received.....	272 "
R. R. Morledge received.....	201 "
U. S. Rohrer received.....	201 "

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N. B. Vineyard received.....	200 votes
J. C. Williams received.....	191 "
George Haller received.....	185 "
F. M. Alexander received.....	187 "
Jacob Wooster received.....	184 "

which said vote was duly certified by said canvassing board, to this respondent, county clerk, as aforesaid. That this relator received the highest number of votes cast at said election for said office of justice of the peace in said city of Hastings, and thereby became entitled to a certificate of election from this respondent, and that on the 9th day of November, 1889, this relator, in a respectful manner, applied to this respondent, and requested him to issue to him, this relator, a certificate of election to the office of justice of the peace, to which he had been elected as aforesaid, and that said respondent then and there refused, and does still refuse, to issue such certificate to this relator, as he was and is entitled to under the laws of the state."

To this petition the respondent answered, in effect, that Adams county has adopted township organization and is divided into sixteen townships, viz., West Blue, Highland, Verona, Kenesaw, Wahda, Juniata, Denver, Blaine, Hanover, Ayr, Roseland, Cottonwood, Logan, Silver Lake, Zerd, and Little Blue, and, in addition, all that part of the west portion of Blaine township and that part of the east portion of Denver township, then included in the corporate limits of the city of Hastings, was by said board of supervisors recognized in said division as the city of Hastings; that said city of Hastings is, and has been for the last two years, divided into four wards, for municipal purposes, viz., First ward, Second ward, Third ward and Fourth ward; that in June, 1887, the board of supervisors of said Adams county, while in regular session, divided said city of Hastings into four election districts corresponding with the ward boundaries, and named the said election districts for election purposes as the First ward,

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Second ward, Third ward, Fourth ward, and ever since then, and on the 5th day of November, 1889, said election districts and said wards have been, were, and still are as above stated, and ever since June, 1889, and on said 5th day of November, 1889, have been, were, and are recognized and used as four separate election districts; that in the fall of 1887 there were elected in each of said wards two justices of the peace to serve for two years and until their successors were elected and qualified; that the relator is and was on the said 5th day of November, 1889, and for six months prior thereto, a resident of the Second ward in said city of Hastings; that on said day, and for over six months prior thereto, A. C. Moore, C. W. Pease, and Jacob Wooster, hereinafter mentioned, were residents and duly qualified electors of the First ward of said city; that on said day, and for over six months prior thereto, R. R. Morledge and U. S. Rohrer, hereinafter mentioned, were residents and duly qualified electors of the Second ward of said city; that on said day, and for over six months prior thereto, N. B. Vineyard and George Haller, hereinafter mentioned, were residents and duly qualified electors of the Third ward of said city; that on said day, and for six months prior thereto, E. Hoepfner, J. C. Williams, and F. M. Alexander, hereinafter mentioned, were residents of and duly qualified electors of the Fourth ward of said city; that the call for the election to be held on the 5th day of November, 1889, among other things, stated: That said election was for the purpose of electing two justices of the peace in and for each of said four wards; that at said election, on the 5th day of November, 1889, aforesaid, there were cast in the First ward of said city for justices of the peace for said ward the following votes:

“For A. C. Moore, a resident of said First ward, 188 votes.

“For Jacob Wooster, a resident of said First ward, 184 votes.

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"For C. W. Pease, a resident of said First ward, 62 votes.

"For E. Hoepfner, a resident of said Fourth ward, 60 votes.

"For W. S. McKinney, the relator, and a resident of said Second ward, 71 votes.

"That at said election, on the 5th day of November, 1889, aforesaid, there were cast in the Second ward of said city for justices of the peace for said Second ward the following votes:

"For R. R. Morledge, a resident of said Second ward, 201 votes.

"For U. S. Rohrer, a resident of said Second ward, 201 votes.

"For W. S. McKinney, the relator, and a resident of said Second ward, 67 votes.

"For E. Hoepfner, a resident of said Fourth ward, 70 votes.

"That at said election on the 5th day of November, 1889, aforesaid, there were cast in the Third ward of said city for justices of the peace for said ward the following votes, viz.:

"For George Haller, a resident of said Third ward, 185 votes.

"For N. B. Vineyard, a resident of said Third ward, 200 votes.

"For W. S. McKinney, the relator and a resident of said Second ward, 80 votes.

"For E. Hoepfner, a resident of said Second ward, 72 votes.

"That at said election, on the 5th day of November, 1889, aforesaid, there were cast in the Fourth ward of said city for justices of the peace for the said ward the following votes:

"For J. C. Williams, a resident of said Fourth ward, 191 votes.

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"For F. M. Alexander, a resident of said Fourth ward, 187 votes.

"For E. Hoeppner, a resident of said Fourth ward, 54 votes.

"For W. S. McKinney, the relator, and a resident of said Second ward, 54 votes; scattering, 1 vote.

"All of which will more fully appear from the certificate of this respondent, as county clerk.

"That said A. C. Moore and Jacob Wooster having received the highest number of votes cast in said First ward for justices of the peace for said ward, and being legally entitled thereto, this respondent issued to each of them a certificate of election for justices of the peace in and for said First ward; that said R. R. Morledge and U. S. Rohrer having received the highest number of votes cast in the Second ward for justices of the peace for said ward, and being legally entitled thereto, this respondent issued to each of them a certificate of election for justices of the peace in and for said Second ward; that said N. B. Vineyard and George Haller having received the highest number of votes cast in said Third ward for justices of the peace for said ward, and being legally entitled thereto, this respondent issued to each of them a certificate of election for justices of the peace in and for said Third ward; that said J. C. Williams and F. M. Alexander having received the highest number of votes cast in the Fourth ward for justices of the peace for said ward, and being legally entitled thereto, this respondent issued to each of them a certificate of election for justices of the peace in and for said Fourth ward."

To this answer the relator demurred, and the cause is now submitted to the court thereon.

Sec. 9 of art. 2 of ch. 14, Comp. Stats., provides that "Precinct lines in that part of any county not under township organization, embraced within the corporate limits of a city of the second class, shall correspond with the ward

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lines in such city, and such precinct shall correspond in number with the wards of the city, and be co-extensive with the same; *Provided*, That when a ward is divided into two election districts, the precinct corresponding with such ward shall be divided so as to correspond with the election districts; *And provided further*, That no justices of the peace or constables shall be elected in such precinct; and every such city shall constitute a district for the election of justices of the peace and constables, and in every such district there shall be elected two justices of the peace and two constables at the time provided by law for the election of such officers in other districts."

In 1889 the legislature passed an act in relation to cities of the first class having less than 25,000 inhabitants which provides for two justices of the peace to be elected by the city at large. That act is not applicable to this case. In 1889 section 7 of the election law was amended as follows: "In counties not under township organization one county judge, one sheriff, one coroner, one county treasurer, one county clerk, one county surveyor, and one county superintendent of public instruction shall be elected in the year eighteen hundred seventy-nine (1879) and every second year thereafter, and in each precinct two justices of the peace and two constables shall be elected in the year eighteen hundred seventy-nine (1879) and every second year thereafter, except as hereafter in this section provided, and three judges and two clerks of election, one assessor, and one overseer of highways for each road district shall be elected in the year eighteen hundred seventy-nine (1879) and annually thereafter, and one county commissioner shall be elected annually, who shall serve three years. In counties under township organization, one county judge, one sheriff, one coroner, one county treasurer, one county clerk, one county surveyor, and one county superintendent of public instruction shall be elected at the first general election after the adoption of township organization, and every second year

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thereafter. At the first general election in each township after the adoption of township organization, one town clerk, one town treasurer, three judges and two clerks of election, one assessor, and one overseer of highways for each road district shall be elected, and annually thereafter; and two justices of the peace and two constables shall be elected at the said election and every second year thereafter, except as hereafter in this section provided; and at the said election one supervisor shall be elected in each township, and thereafter each odd numbered year in the odd numbered townships, and each even numbered year in the even numbered townships, said townships to be numbered by the county board at their first regular meeting after the passage of this act, or the subsequent adoption of township organization, as nearly as practicable, in the same manner as government sections are numbered in a government township. And at the first general election after the adoption of township organization in any county, in each city and in each village, one supervisor for every 1,000 inhabitants therein, one assessor, three judges and two clerks of election shall be elected, and annually thereafter, and in each ward and in each village having more than five hundred (500) inhabitants, two justices of the peace and two constables shall be elected at said election and every second year thereafter."

The provisions of the act just quoted control the election of justices in cities of the second class having more than 5,000 inhabitants and they modify sec. 9, art. 2, ch. 14, of Comp. Stats. Each city of the kind designated is entitled, therefore, to elect two justices of the peace in each ward of the city. The words "in each ward and in each village having more than 500 inhabitants, two justices of the peace and two constables shall be elected at said election," are clear and unambiguous and were evidently intended to authorize the election of two justices of the peace in each ward of the city.

As there are four wards and such officers have been

Howell v. Wise.

elected in each ward of the city of Hastings, the relator was not elected justice of the peace of said city and is not entitled to the relief prayed for.

The writ is therefore denied.

WRIT DENIED.

THE other judges concur.

HOWELL BROTHERS V. W. A. WISE ET AL.

[FILED FEBRUARY 18, 1890.]

The Evidence examined, and held, to sustain the findings of the trial court.

APPEAL from the district court for Lancaster county.
Heard below before FIELD, J.

Billingsley & Woodward, and *A. J. Sawyer*, for appellants, cited: *Ballou v. Black*, 17 Neb., 398; *Foster v. Dohle*, Id., 633.

Selleck & Lane, contra, cited: *Wallace v. Flierschman*, 22 Neb., 204; *Poessenecker v. Weatherby*, 16 Id., 94.

NORVAL, J.

The plaintiffs, Howell Brothers, brought an action in the district court of Lancaster county to foreclose a mechanic's lien against the real estate of the defendants, J. I. Salter and Roxa B. Salter, for materials furnished for the erection of a small one story frame dwelling for the Salters. The defendant W. A. Wise was the contractor and builder, who was to furnish all the labor and materials for the erection of the building, and to whom all the materials were sold.

The plaintiffs' lien was filed on the 16th day of December, 1886. The defendant W. J. Turner filed a cross-petition setting up a lien for paints, brushes, glass, and other materials, which lien was filed on the 6th day of January, 1887.

The court below found in favor of said plaintiffs, Howell Bros., for the amount claimed, to-wit, \$365.12, with interest at 7 per cent thereon from October 29, 1886, against W. A. Wise, and the court also found that there was due to the defendant Turner from the defendant W. A. Wise the sum of \$20.15, with interest at the rate of 7 per cent per annum from October 26, 1886, and gave said plaintiffs and said defendant Turner judgment against said Wise accordingly, but found that the said plaintiffs and the said defendant Turner were not entitled to liens against the premises of the Salters. The plaintiffs and the defendant Turner appeal from the decision denying their lien.

As to the appeal of Howell Brothers, there is only one question for our consideration, and that is, Did they file their lien within sixty days from the time the materials were furnished? It appears from the evidence that it is usual for plaintiffs' teamsters to take a receipt from the person to whom materials are delivered, and several of these original receipts are in the bill of exceptions. The dispute is as to four small deliveries of materials. The plaintiffs claim they were delivered after October 16, and the defendants Salter insist that no materials were delivered after that date. The first disputed delivery is that of October 20, of some finishing lumber. A receipt is in the record signed by Wise bearing that date and marked on the receipt the words "Teamster, Morgan."

Edward Morgan, one of the plaintiffs' teamsters, testified to making one delivery, as follows:

Q. State if you were out at Salter's house on the place where the lumber was being delivered for his house in October, 1886.

Howell v. Wise.

A. Yes, sir; I took one load out there.

Q. What were you doing?

A. It was finishing lumber altogether.

Q. That is all you hauled?

A. Yes, sir.

Q. That was in October, 1886?

A. Yes, sir; I think it was.

Q. Do you know what part of the month it was in?

A. I could not tell; the tickets tell; we have tickets every load we take out.

* * * * *

Cross-examination:

Q. You say you do not remember when you took that?

A. I could not tell exactly the day; we were delivering lumber all the time, one day after the other.

Q. Were you delivering for Howell Brothers anywhere else?

A. Yes, sir.

Q. Working for them right along?

A. Yes, sir.

Q. That bill of lumber that you saw there with your name attached to, you do not know whether that lumber was used in that house or not?

A. No, sir.

Redirect:

Q. Do you know how long they had been delivering there before you hauled out yours?

A. I couldn't tell exactly, maybe two weeks; mine was the finishing up. They were just finishing up the house, I was driving a one-horse rig, and I generally took out the finishing lumber for the buildings—light lumber.

The undisputed testimony is that the first delivery of the lumber was on the 25th day of September. Some finishing lumber and mouldings were delivered on October 5, and another small delivery was also made on October 8,

as appears from the teamsters' receipts. Neither of the receipts names the person who made the delivery. The Salters claim that the witness Morgan made one of them. Mr. Morgan testified his delivery was about two weeks after the first materials were furnished for the house, which would bring it about October 5 or 8.

Another teamster of plaintiff, Fred Swanson, testified that he remembers hauling two loads, but it is not claimed that he made either of the four deliveries in dispute, hence his testimony does not throw any light upon the controversy.

Mr. L. S. Kroetch, the manager of plaintiffs' business, gave testimony by deposition, from which it appears that he sold the materials to the contractor Wise; that materials covered by the disputed charges of October 22 and 29 were delivered to Mr. Wise in plaintiff's yard, but there is no evidence to show that they ever went to Salter's premises. There are no teamsters' receipts even in the record, for the materials claimed to have been furnished October 22 and 29, and there is no competent evidence even that they were delivered to Wise in plaintiff's yard, as the following cross-examination of the witness Kroetch shows:

Q. To whom was it delivered?

A. To Mr. Wise.

Q. How do you know it was delivered to Mr. Wise?

A. It was reported so by Mr. Miller.

Q. Then your opinion is based upon the report?

A. Yes, sir.

Q. You have no personal knowledge?

A. No, sir.

To establish the delivery of the four small items of date of October 26, is a teamster's receipt signed for Wise by one J. T. Dailey. There is a charge for one transom after October 16, yet no witness testified that it was ever delivered at plaintiff's premises, and the evidence is overwhelming that there is no transom in Salter's house.

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The evidence on the part of the Salters is to the effect that they lived within a few feet of the house while it was being built, were around there constantly, that Wise pushed the work and had all the work completed by October 14, and no materials were delivered there after that date.

J. I. Salter testified when the last materials were furnished and house was completed as follows:

Q. Now, when was that house finished; the carpenter work in the house I am inquiring for now?

A. It was finished as far as it is finished now, on or about the 13th day of October. * * *

Q. State if at that time you examined to see whether the material was there or not.

A. On the 13th I went through the house; I made a thorough examination, as thorough as I knew how to make; the material, as far as any has been used since—the material was all there that has been used on the house since, the most of it in place; there was a part of the baseboards in the front room that were not nailed on, it was leaning up against the side of the house, but it was there.

Q. How about the doors and windows?

A. The windows, I am not positive whether they were all in; at any rate they were all there, and I think all in, and there was one door I am sure that was not hung.

Q. When did you next examine?

A. The next day, on the 14th, I went to work in what is called Peak's orchard for Mr. Heartz up here, and I don't recollect of being in the house at all. * * * On the 15th, in the morning, I went into the north door of the dining room, and through the dining room through the front room, and out at the south door. I saw that the baseboards were in place at this time; this was in the morning; then at noon when I came home, I went and looked in the bedroom; opened the doors and looked in the bedroom, and there was nothing I could see but what was complete and finished there.

Howell v. Wise.

Q. Then on the 15th you say everything was in place?

A. Everything I could see; there was nothing done afterwards, only oiling of the floors and staining.

Q. Has there ever been any carpenter work done by Mr. Wise or his men on your house after the 15th day of October, 1886?

A. No, sir. * * *

Q. State how many transoms there are in that house.

A. There is not a transom and never was in the house or cellar, either in the foundation of the cellar or in the house.

Q. There is none there now?

A. No, sir, and never has been.

Mr. Salter is corroborated by the testimony of his wife and also by a written memorandum introduced in evidence, which she claims to have made at the time. If the testimony of the Salters is entitled to credit, no materials were delivered by the plaintiffs within sixty days prior to the date of filing their claim for a lien. It was peculiarly the province of the trial court, who had an opportunity to see the witnesses and hear their testimony, to say what witness was entitled to credit. A reviewing court will only examine the evidence sufficiently to ascertain that the trial court had sufficient facts before it upon which to base its decision. There being ample evidence in the record, if true, to uphold the decree that the plaintiffs were not entitled to a lien, the decree in that regard will not be disturbed.

There is no competent evidence that any of the materials sold by Turner were ever delivered at Salter's house. Mr. Turner testified that the first articles Wise took with him, and "that on the 8th of November he came in and said he would like to have the oil and the other goods sent out, and we sent those out by a dray." Mr. Turner further testified:

Q. Did you deliver these goods yourself?

City of Lincoln v. Smith.

A. Do you mean in person at the place?

Q. Of your own personal knowledge do you know where those goods went to?

A. No, sir, not after they left the store.

Q. The only knowledge you have as to the destination of the goods is what somebody told you?

A. The drayman to whom I delivered the goods, after his return, I paid him, he said he delivered them at that place.

No other witness was called to establish Turner's claim. The Salters both testified that no goods were delivered at their place after October. If their testimony is true, Mr. Turner's goods were delivered at some other place. The evidence fully sustains the findings of the trial court, and its decree is affirmed.

DECREE AFFIRMED.

THE other judges concur.

CITY OF LINCOLN V. LEVI R. SMITH.

1. **Municipal Corporations: DEFECTIVE SIDEWALKS.** A city is required to use all reasonable care and supervision to keep its streets and sidewalks in a reasonably safe condition for travel in the ordinary modes of travel; and if it fail to do so, it is liable for injuries sustained in consequence of such failure, provided the party injured was exercising reasonable care.
2. ———: ———: **NOTICE.** To render a municipal corporation liable for injuries caused by a defective sidewalk, it is not necessary that it should have had actual notice of the defect. If a state of facts exist such that ignorance can only arise from a failure to exercise reasonable official care, notice will be presumed.
3. ———: ———. The care and diligence required of a city in keeping its sidewalks in a reasonably safe condition for travel, is not affected or varied by the number of miles of sidewalk therein.

28 762
39 806
39 722

28 762
40 136
41 93

28 762
42 72
42 137
43 410
43 730

28 762
45 869

28 762
47 643

28 762
50 801
51 155
52 76
54 29

28 762
56 765

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4. ———: ———. The fact that a defect in a sidewalk is concealed by recently fallen snow does not release the city from liability.
5. ~~The Carlisle Tables~~ of expectancy of life were properly admitted in evidence.
6. Instructions given to a jury must be construed together, and if when considered as a whole they properly state the law, it is sufficient. (*Bartling v. Behrends*, 20 Neb., 211.)
7. Instructions that have no evidence to support them should be refused.
8. ———. It is proper to refuse instructions the principles of which have already been fully presented to the jury.

ERROR to the district court for Lancaster county. Tried below before CHAPMAN, J.

G. M. Lamberton, and H. J. Whitmore, for plaintiff in error:

The testimony of defendant in error shows that the snow and not the opening caused him to fall; as this was a cause independent of the culpable defects in the sidewalk, the city was not liable. (*Ring v. Cohoes*, 77 N. Y., 88; *Taylor v. Yonkers*, 105 Id., 202; *Searls v. Manhattan R. Co.*, 101 Id., 661; *Moore v. Abbott*, 32 Me., 46; *Moulton v. Sanford*, 51 Id., 127; *Marble v. Worcester*, 4 Gray [Mass.], 395; *Billings v. Worcester*, 102 Mass., 329.) There was a total failure to prove notice of the defect, without which the city would not be liable. (*City of Boulder v. Niles*, 9 Colo., 415; *Joliet v. Gerber*, 21 Ill. App., 622; *Chicago v. Dalle*, 115 Ill., 386; *Turner v. Indianapolis*, 96 Ind., 51; *Aurora v. Bitner*, 100 Id., 396; *Cook v. Anamosa*, 66 Ia., 427; *Chase v. Cleveland*, 44 Ohio St., 505; *Galveston v. Barbour*, 62 Tex., 172; *Dillon, Mun. Corp.*, sec. 1020, *et seq.*) By the second instruction given, the jury was left to infer that the city was bound to keep its sidewalks *absolutely* safe, when as a fact they are only required to be kept *reasonably* safe. (*City of York v. Spelman*, 19 Neb., 357; *City of Lincoln v. Walker*, 18 Id., 250; .

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Same v. Gillilan, Id., 119; *Same v. Holmes*, 20 Id., 39; *Gosport v. Evans*, 112 Ind., 478; *Emporia v. Schmidding*, 33 Kan., 485; *City of Boulder v. Niles*, *Taylor v. Yonkers*, and *Ring v. Cohoes*, *supra*; *Dillon*, Mun. Corp., sec. 1019.) By refusing the eleventh instruction asked, the jury was prevented from considering the area and size of the city which was proper, as a defect in a sidewalk would be discovered sooner in a small place than in a large one. (*Reed v. Mayor*, 31 Hun. [N. Y.], 312.)

Selleck & Lane, contra:

A hole in the walk was proved to exist, eight inches wide by four feet long, and from five to six inches deep, from which the injury was shown to have resulted, and of which notice, both actual and constructive, was given to the city. It is therefore liable. (*Brennan v. St. Louis*, 2 S. W. Rep. [Mo.], 481; *Bassett v. St. Joseph*, 53 Mo., 290; *Hull v. Kansas City*, 54 Id., 598; *City of Plattsmouth v. Mitchell*, 20 Neb., 223; *Baldwin v. Greenwood's Co.*, 40 Conn., 238; *Ring v. Cohoes*, 77 N. Y., 83, 88; *Taylor v. Yonkers*, 105 Id., 202; *Dillon*, Mun. Corp., sec. 1017.) The second instruction given states the law correctly, and is the identical language of *Dillon*, sec. 1017. (*City of Omaha v. Olmstead*, 5 Neb., 449; *City of Lincoln v. Walker*, 18 Id., 249; *City of Plattsmouth v. Mitchell*, 20 Id., 231; *County of Howard v. Legg*, 110 Ind., 472; *Village of Mansfield v. Moore*, 124 Ill., 133; *City of Rock Island v. Guinely*, 126 Id., 408; *Village of Jefferson v. Chapman*, 127 Id., 438; *Arey v. Newton*, 148 Mass., 498; *Hunt v. New York*, 109 N. Y., 134; *Turner v. Newburgh*, Id., 301; *Goodfellow v. Mayor, etc.*, 100 Id., 18; *Circleville v. Neuding*, 41 Ohio St., 469; *Rusch v. Davenport*, 6 Ia., 447; *Rowell v. Williams*, 29 Id., 213; *James v. Portage*, 5 N. W. Rep. [Wis.], 31; *Estelle v. Lake Crystal*, 6 N. W. Rep. [Minn.], 775; *Sterling v. Merrill*, 17 N. E. Rep. [Ill.], 7; *Delger v. St. Paul*, 14 Fed. Rep., 567; *City of Boulder v. Niles*, 9

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Colo., 415; *Bishop v. Schuylkill*, 8 Atl. Rep. [Pa.], 449.) The sixth instruction fairly presents the question of notice, and is based upon the evidence. (*City of Plattsmouth v. Mitchell*, 20 Neb., 228; *Chicago v. Dalle*, 115 Ill., 386; *Turner v. Newburgh*, 16 N. E. Rep. [N. Y.], 344; *Waldron v. St. Paul*, 22 N. W. Rep. [Minn.]; *Nichols v. Minneapolis*, 23 Id., 868; *Cook v. Anamosa*, 23 N. W. Rep. [Ia.], 907.) The instructions considered as a whole, as they should be, fairly and correctly present the case to the jury. (*Campbell v. Holland*, 22 Neb., 607; *Village of Ainsfield v. Moore*, 124 Ill., 133; *Beazan v. Mason City*, 58 Ia., 235.)

NORVAL, J.

This action was brought by the defendant in error against the city of Lincoln to recover damages for injuries received by him by reason of a fall upon a sidewalk in said city, said fall being caused, as he alleges, by the defective condition of said sidewalk. In his petition he alleges:

1. That said city is a municipal corporation and city of the first class having less than 60,000 inhabitants, and organized under and by virtue of the laws of the state of Nebraska.

2. That as such municipal corporation said city had the care, management, and control of the streets and sidewalks within said city, and had power and authority and the necessary means, and that it was its duty, among other things, to keep said streets and sidewalks in good condition and repair, so that persons could at all times reasonable and proper, walk over and along the same without danger of receiving physical injury therefrom.

3. That Sixteenth street, otherwise known as Grand avenue, is one of the principal streets in said city, and that the west side of said Sixteenth street, between Q and R streets, is near the business portion of said city, and at a place where there was much travel at and a long time prior

to the time when the injury complained of by the plaintiff was received.

4. That for a long time prior to the receiving of the injury complained of by the plaintiff, the sidewalk on the west side of said Sixteenth street, between said Q street and said R street, and more particularly in front of lot A, in block 32, of S. W. Little's subdivision in said city, was defective and in a dangerous and unsafe condition for travel thereon, by reason of the uneven surface of said sidewalk caused by the removal of several planks from the same; that the said sidewalk was constructed of planks laid across wooden supports extending lengthwise of said sidewalk, to which supports the said planks were fastened by nails; that the nails of several of the planks in said sidewalk had been allowed to become and remain loosened; that the planks were thereby loosened, and some of them had been removed entirely from said sidewalk, thereby causing deep and dangerous holes in said sidewalk, were concealed and rendered extra hazardous and dangerous to travelers thereon; that the defendant city had actual and constructive notice of said defect, and in not repairing the same, or so providing as to prevent or warn persons from passing over the same, was guilty of gross negligence and want of care.

5. That on the said 10th day of January, 1887, plaintiff was lawfully traveling on foot on said Sixteenth street and on the sidewalk thereon in the locality above described, and while so traveling on said sidewalk, and while in the exercise of ordinary care, and without any fault on his part and without any warning, he not then seeing or knowing of the defect in said sidewalk, or of any defect whatever in the same, plaintiff stepped on the edge of the plank next to the place from which said planks had been removed, and by reason of the absence of said planks from their proper place, he fell and was thrown with great force and violence backwards onto said sidewalk, the small of

his back striking across the edge of a plank of said sidewalk, whereby plaintiff was greatly and permanently injured in and about the small of his back, and was otherwise bruised, strained, and internally injured thereby; that by means of said injuries he has been totally disabled for doing manual labor of any kind whatever, and rendered an invalid for life, to his damage in the sum of \$10,000.

6. That long prior to the filing of his petition, and within three months of the date of the injury complained of, plaintiff presented his said claim in writing, giving a statement of plaintiff's full name, the time, place, nature and circumstances of the said injury, all in due form as required by law, and filed the same with the clerk of said city; and the same was read at a meeting of the city council held a long time prior to the commencement of this action, and that defendant has wholly failed and neglected to allow said claim or any part thereof.

The answer of the defendant city denies the defect, denies notice, and avers contributory negligence.

The reply is a general denial of all allegations contained in said answer.

On the trial of said cause it was stipulated by the parties:

1. That the defendant city is a municipal corporation as alleged in plaintiff's petition.

2. That Sixteenth street between Q and R streets is one of the regularly laid out and platted streets of said city.

There was a trial to a jury, with a verdict for the plaintiff for the sum of \$1,500. The defendant's motion for a new trial was argued, considered, and overruled, and judgment was entered upon the verdict, to which the defendant duly excepted on the record and assigns the following errors:

1. The verdict is not sustained by sufficient evidence.

2. It is contrary to law.

3. Errors of law occurring at the trial.

4. In giving Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 of the instructions asked by plaintiff.

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5. In refusing to give defendant's requests, Nos. 2, 3, 5, 10, 11, 12, 13, 14, 15, 16, 18, and 19.

The first error complained of is that the verdict is not sustained by sufficient evidence. It is claimed that the evidence has failed to establish:

1. That plaintiff has suffered a permanent personal injury and that he is damaged thereby.

2. That said injury was caused wholly by a defect in the sidewalk.

3. That said defect was actually known to the city authorities long enough before the accident for them to have repaired it, or that it had existed for a sufficient length of time prior to the accident for the city authorities in the proper exercise of their duties, to have discovered and repaired it.

The evidence shows that the plaintiff was the only person present when the injury was received, and his testimony, describing how it occurred, is uncontradicted. The plaintiff describes the manner in which the injury was received as follows:

"I left home in the morning, I should judge somewhere about 7 o'clock. I had been in the habit when I came down town of taking the street car. When I came out to R street, the R street line, there was no car in sight, so I made up my mind I would walk. I walked down and I had been walking on a good walk. I was not in the habit of coming down town afoot and when I got to the corner of R and Sixteenth streets, I turned off on the west side of Sixteenth street, I should judge—I never measured the distance, but I should judge between ten and fifteen feet on the west side of the street, I was walking along rather briskly, and there had been a light, dry snow, and it was snowing very light at the time and blowing some and drifting, and I was walking along—I am generally pretty sure-footed—I stepped on the edge of a hole in the walk and fell over backwards; my foot slipped into the hole and I fell over backwards.

Q. Had you ever been over that walk before?

A. Never.

Q. You said you fell; how did you fall?

A. *I stepped with my left foot into the hole and slipped into the hole and fell over backwards, struck the small of my back on the edge of the walk.*

* * * * *

Q. Explain exactly how you fell into the hole.

A. The stringers of the walk were running lengthwise, and the walk was short planks laid crosswise of the stringers. I will describe it to you so you will see: Say I was coming from the side here, I was going south and here was a plank, I stepped on the edge of the plank the same as there, and the plank being gone in front there, which I didn't see, when my heel struck on the edge of the plank here it went into the hole and I fell over backwards, *stepped with my left foot in the hole, and fell partially sideways and struck my back against the out edge of the plank.*

* * * * *

Q. What part of your back struck on the edge of the walk?

A. The small of my back, across the spine. * * *

Q. Then, if I understand you correctly, you stepped with your heel on the edge of the walk and your foot projected out over the hole?

A. Yes, sir.

Q. How did you fall; I mean in what way, with force or not?

A. Yes, sir, I did.

Q. About what was your weight at that time?

A. One hundred and ninety-eight pounds, between 197 and 198. * * *

Q. State how you felt; you say your back felt bad, what do you mean?

A. It pained me very bad.

Q. Where was it located?

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A. Just above my hips, across the small of my back, where I struck the walk.

Q. After sitting up what did you do?

A. I got up on my feet and walked a few steps and sat down on the railing.

Q. Why?

A. My back pained me so bad.

Q. State what you did.

A. I believe I stated that I sat down on the railing; I turned then and went back and examined the hole in the walk.

Q. Now, when you examined that hole what did you find it to be?

A. One plank gone out of the walk.

Q. How wide a hole in the walk was that?

A. I should judge it was about eight inches wide, the plank was that was gone out of the walk.

Q. How deep was that hole?

A. Between five and six inches, to the best of my knowledge.

Q. Why did you not see that hole?

A. It was filled with light dry snow.

Q. Was the hole apparent to you before you had stepped into it?

A. Not to me it was not. * * *

Q. Were you giving attention to the walk as you were walking along there?

A. Why yes, sir, I had been walking on a good walk, and I didn't think anything about bad walks, because I was not acquainted with the condition of the walks in the city at that time.

It appears further from the plaintiff's testimony that after the accident he was able to proceed but a short distance before he was compelled by the pain to sit down upon the railing, and that with great pain and difficulty he was able to reach the store, some six or seven blocks

distant, only after an effort continuing for more than an hour; that overcome by this exertion he remained at the store, lying down upon one of the back counters therein, until about four o'clock in the afternoon, when he was assisted to his home and to his bed; that for one day, with the assistance of his wife, he sought to alleviate his sufferings by means of liniments and other ordinary appliances, but by the second morning he had grown so much worse, he sent for Dr. Fuller, who prescribed for him; that he remained under the physician's care and treatment for several months—until Dr. Fuller died—when Doctors Hart were called, and that he remained under their professional care until the time of trial. At the time of the injury the plaintiff was forty-seven years old, hearty and robust, a carpenter by trade, and had constant employment at \$2.50 per day, but that since the accident he has been in constant pain and unable to perform manual labor. The plaintiff is corroborated as to the nature and extent of the injury by the testimony of his wife, G. O. Boettcher, Paul Seidell, W. F. Learn, and George Smith. Doctors Hart, Everett, and Haggard each testify that the injury is of a permanent character. To oppose this testimony the defense called Doctors Beachly, Holyoke, and Crim, who, after making but a single examination, testify that they were unable to find that the plaintiff was injured. While the evidence on this branch of the case is conflicting, the preponderance is with the plaintiff, and the jury was fully justified in finding that the plaintiff had sustained a permanent injury.

The plaintiff in error contends that the recent fall of snow was a contributing cause of the injury, and that without the snow the accident would not have happened. The evidence fails to show that the snow caused the plaintiff to slip or that it made the sidewalk slippery at the place the accident occurred.

It will be seen by reference to the testimony of the plaintiff

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iff that he stepped into a hole in the sidewalk and fell. The defect in the sidewalk was the direct and proximate cause of the plaintiff's falling and receiving the injury. It is quite possible the plaintiff would not have fallen had the walk been clear of snow, for he would then have doubtless discovered that the board was missing.

The question is not whether the accident would not have occurred if the hole in the walk had not been filled with snow, but whether that walk with the plank missing, with snow as would ordinarily fall upon it at that season of the year, at the place of the injury was unsafe for travelers upon it. If in that condition, under such circumstances, it was unsafe, then it was defective. The fact that the defect was concealed by the snow does not release the city from liability. (*Grossenbach v. City of Milwaukee*, 26 N. W., 182; *Street v. Inhabitants of Holyoke*, 105 Mass., 82; *Hill v. City of Fond du Lac*, 14 N. W., 25; *Harris v. Township of Clinton*, 31 Id., 427; *Dooley v. City of Meriden*, 44 Conn., 117.)

Plaintiff in error contends that the evidence fails to show that the city had knowledge of the defect long enough prior to the accident to have repaired it.

The rule of law adopted by the courts is that it is not necessary that the authorities of a city should have actual notice that a sidewalk is defective in order to make the city liable. It is sufficient for the plaintiff to prove that the defendant had notice of the defective condition of the sidewalk or establish the existence of facts from which notice would be inferred, or circumstances from which it appears that the defect ought to have been known. (*City of York v. Spellman*, 19 Neb., 383.) There is in the bill of exceptions testimony which tends to establish the fact that the defendant city had both actual and constructive notice of the defective condition of the walk. The accident occurred January 10, 1887, and the defect was known to Street Commissioner Byer some time before. We quote from his testimony:

Q. What official position, if any, did you hold in the city of Lincoln during the year 1886?

A. I was street commissioner.

Q. As such street commissioner what were your duties?

A. There was a good deal; I had to take care of the streets, see that they were in condition, as well as I could do it, and the walks and crossings of the city.

Q. Were you at that time familiar with the sidewalks on the corner of Sixteenth and R streets, where this injury is alleged to have occurred?

A. Yes, sir, I was. * * *

Q. Now confine your attention to the point in the walk some fifteen or twenty feet south of the R street line; what was the defect in that walk?

A. There was one plank, two by six, four feet long, that was laid upon a two by four for stringers, that was missing.

Q. Was it in reference to that defect that you gave notice?

A. Yes, sir.

Q. During what part of the year was this notice given?

A. I think it was along in the fall.

Q. Of what year?

A. The fall of 1887.

It is evident from the rest of the testimony of this witness that it was in 1886 he gave the notice, and not 1887.

Mrs. Smith testified that she was along this walk where the accident occurred, on the 5th of November previous, and at that time some of the planks were missing. She is corroborated by the testimony of Bessie Smith, who testified that she saw holes in the walk there many times between November and the date of the injury.

T. J. Crawford testified:

Q. Have you been familiar with the walk on the west side of Sixteenth and south of R?

A. Not lately, I have not.

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Q. Were you familiar with it up to about the 10th day of January, 1887, from that time previous?

A. Yes, sir; I used to walk that way when I came to town.

Q. At and prior to January 10, 1887, continuing for say two or three months, what was the condition of that walk?

A. There was a plank or two out; that was all.

Q. Now, whereabouts in that walk were those planks gone?

A. There was one plank gone out near the north end of the walk near R street.

The testimony of these witnesses shows that the defect had existed for some time prior to the accident, and that it was apparent. The city was chargeable with notice. (*Waldron v. St. Paul*, 22 N. W. Rep., 4; *Troxel v. City of Vinton*, 41 Id., 580.)

Several errors are assigned on the rulings of the trial court upon the objections to the admission of testimony which we will now notice. This question was propounded to the witness Byer: "What, if anything, did you do officially with reference to that sidewalk?" To this the defendant objected, as incompetent, immaterial, and irrelevant. He also objected to the witness stating what he had notified other people, and for the further reason that they had not fixed the identical place, nor was the witness's attention called to it. The objection was overruled and exception was taken, and the witness answered: "I had notified the agents of the lot, Easterday Bros., in regard to the condition of the walk, to repair it." If this ruling was error it was without prejudice, for the witness afterward testified, without objection, to the giving of the notice.

There was no error committed in permitting the witness Boettcher to testify as to the condition of the walk a week after the injury. It was competent to prove its condition shortly after the accident, as tending to show that the de-

fect existed at the time of the injury. (*City of Chicago v. Dalle*, 5 N. E. Rep., 579.)

Dr. B. F. Hart was asked the following question: "Suppose a man forty-seven years old, weight about 197 or 198 pounds, while walking along and over the sidewalk, should step so far that his foot should slip into a hole in the sidewalk and he should be violently thrown backward, striking his back, the small of his back, across the edge of the walk, causing an injury followed immediately by a severe pain in the back, what, in your opinion, would be the probable effect upon the man from such a fall and such injury?" The record shows that after the question was asked the defendant renewed his *motion* made last above. Overruled; exception. This objection was not specific, and we are unable to determine what the motion was. The question, however, was so framed as to reflect the facts, and the answer elicited was proper and competent.

It was not error to permit the Carlisle Tables to be introduced in evidence. The proper foundation was laid for their introduction. The plaintiff at the time of the injury was in good health, and there being evidence before the jury tending to establish that his injury was of a permanent character, the tables were proper evidence to go before the jury. (*Roose v. Perkins*, 9 Neb., 304.)

The defendant was not prejudiced by the court permitting Mr. Selleck to testify that he had filed the claim of the plaintiff with the city clerk, for the reason that the matters testified to by him were fully alleged in the petition, and not denied in the answer. We are of the opinion that no error was committed in the introduction of testimony of a nature so serious as to require a reversal.

The remaining errors complained of consist in the giving and refusing of certain instructions.

The court at the request of the plaintiff gave the following instructions, to each of which the plaintiff in error excepts:

"First—This is an action brought by the plaintiff Levi R. Smith against the defendant the city of Lincoln, to recover damages from said city for injuries received by the plaintiff, as he alleges, by reason of a fall on or about the 10th day of January, 1887, upon a sidewalk in said city of Lincoln, on Sixteenth street between Q and R streets, in said city. He alleges that said fall and injury were caused by the negligent failure on the part of said defendant to keep the said sidewalk in proper repair and in negligently allowing the accumulation of snow and ice thereon, and says that said sidewalk was defective, unsafe, and dangerous to travelers passing over it in the ordinary mode and that he has been damaged in the sum of \$10,000 by defendant's neglect of duty as alleged. Issue is joined upon these allegations by the answer of the defendant and plaintiff's reply thereto.

"Second—Under its charter and under the law it was the duty of the defendant city to keep its sidewalks, including that on the west side of Sixteenth street between Q and R streets, where the alleged injury occurred, in a safe condition for use in the ordinary modes and free from defects and obstructions dangerous to persons passing along the same, with ordinary care, and it is liable to plaintiff for injuries, if you should find from the evidence any were sustained by him, resulting from neglect on the part of defendant to perform that duty, unless you find that plaintiff was guilty of contributory negligence; provided said city had notice of the defective and dangerous condition of said sidewalk or that the said sidewalk had remained in a defective and dangerous condition for such length of time as that said city might, in the exercise of reasonable care, have had notice of the same.

"Third—If you find from the evidence that the injury to the plaintiff complained of was occasioned by the negligence and want of ordinary care of defendant, you are instructed that the burden of proof is then upon the de-

fendant to satisfy you that the negligence and want of ordinary care of the plaintiff contributed thereto, in order to prevent a recovery in this case.

"Fourth—(a) Under ordinary circumstances persons traveling on the streets and sidewalks by the usual modes are required to use ordinary care and diligence, and you should presume that plaintiff exercised such care, unless the evidence shows negligence or fault on his part.

"(b) The plaintiff was not required to anticipate danger nor to be on the lookout for its existence.

"(c) Ordinary care on the part of the plaintiff is that degree of care and diligence which persons of ordinary prudence would usually use under the circumstances in which the plaintiff was placed at the time the alleged injury was received.

"Fifth—If you find from the evidence that the plaintiff was injured at the time and place and in the manner as alleged in his petition, then the plaintiff is entitled to recover if he was in the exercise of ordinary care and prudence at the time of the injury, and the injury was attributable to the defective condition of the sidewalk, combined with some accidental cause, as the accumulation of snow on said sidewalk; provided said city had notice of the defective condition of said sidewalk, or that the said sidewalk had remained in a defective condition for such length of time as that said city in the exercise of reasonable official care might have had notice of the same.

"Sixth—If you find from the evidence that the sidewalk where the injury complained of by plaintiff is alleged to have occurred was in a defective condition so that the snow which had fallen thereon the night previous to said accident rendered said walk dangerous to foot passengers, and prevented plaintiff from detecting said defect when passing over the same in the ordinary manner of foot travel, and when exercising due care, and that plaintiff had no notice of such defect, then you are instructed that said

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defendant city would be liable for the injury, if you find that any occurred to plaintiff, occasioned by such defect and resulting from the same; provided you further find that the city defendant had notice of such defect in its sidewalk or that said defect had existed for such a length of time as that said city and its authorities in the exercise of reasonable care might have had notice of said defect.

"Seventh—It is not necessary that actual notice to the municipal authorities of the defective condition of the sidewalk in question be shown; such notice will be presumed if you find from the evidence that the said sidewalk remained for a considerable length of time in so defective a condition that it was unsafe to travel over with ordinary care.

"Eighth—If you find from the evidence that the street commissioner of the defendant city had actual notice of the *defective condition* of the said sidewalk, then you are instructed that such notice to said street commissioner is notice to the defendant city.

"Ninth—If you find for the plaintiff, then, in ascertaining from the evidence the amount he ought to recover, you should carefully consider the nature, extent, and character of the injury sustained, whether the disability is temporary or permanent, partial or total, and what degree of disability exists; and in considering this you should take into account the age of the plaintiff, and his reasonable expectancy of life, for you should allow not only for damages already past, but for all damages which would naturally and reasonably result from the injury, whether in the past or future. You should find from the evidence how much money plaintiff would reasonably have been able and reasonably expected to earn if he had not been injured, as alleged, and how much he was and is and will be able to earn with his reduced capacity resulting from said injury, and the difference between these two amounts will be the measure of this element of his damages. You should also

allow him for any necessary and reasonable expenses incurred for medicines, if any such expenses have been proven. The law fixes no rule by which you are to estimate or fix a price upon bodily pain, suffering, or agony, but leaves it to you to allow plaintiff such reasonable sum for this element of his damages as may be just and reasonable under all the circumstances of the case, not exceeding in all the sum of \$10,000.

"Tenth—If you find for the plaintiff, and if you should further find that, by reason of the injuries complained of, the plaintiff has been totally and permanently disabled or prevented from following his usual means of gaining a livelihood, you should allow him, as this element of his damages, such sum as you find from the evidence that he would have been reasonably able and reasonably expected to have earned during the balance of his life, if he had not been injured, as alleged, not exceeding the sum of \$10,000 in all."

The following instructions were given at the request of the defendant city :

"First—The jury are instructed that to entitle the plaintiff to recover against the city in this case, the evidence should show to the satisfaction of the jury one or the other of the following facts, namely : That the city had actual prior notice of the defect in the sidewalk which caused his injuries, or that such sidewalk had remained in such defective condition for an unreasonable length of time prior to the accident; and if neither of these facts have been shown by the testimony in this case, the plaintiff cannot recover in this action.

"Fourth—If you find that the sidewalk in question was in a reasonably good and safe condition under all circumstances, you will find for the defendant.

"Sixth—The jury are instructed that before they can find for the plaintiff they must find that the plaintiff has suffered injury, that the injury was caused by a defect in

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the sidewalk, that said defect left the sidewalk in an unreasonably dangerous condition, that the plaintiff did not contribute to said injury by any negligence on his part, that the city authorities had actual knowledge of said defect in time to have repaired same before the accident happened, or that the defect had been notorious and continued for a length of time within which the city authorities, in the exercise of reasonable care and diligence, could have known of the same.

"Seventh—The defendant is not required to have the sidewalks so constructed as to secure absolute immunity in using them; nor is it bound to employ the utmost care and exertion to that end. Its duty under the law is only to see that its sidewalks are reasonably safe for persons exercising ordinary care and caution.

"Eighth—You are instructed, as a matter of law, though you should find from the evidence that the injury complained of is the combined result of an accident and a defect in the street or walk, yet if you also find that by the use of ordinary care and prudence on the part of the plaintiff the accident might have been avoided, you must find for the defendant.

"Ninth—The burden of proving negligence rests upon the party alleging it; and where a party charges negligence on the part of another as a cause of action, he must prove the negligence by a preponderance of evidence. And in this case, if the jury find that the weight of evidence is in favor of the defendant, or that it is equally balanced, then the plaintiff cannot recover and the jury should find the issues for the defendant. If you find that the plaintiff is entitled to recover in any amount whatever, then no allowance can be made for medical services, unless the same have been paid or liability incurred therefor, and such sum must be only a fair and reasonable compensation. In this case it does not clearly appear from the evidence the nature and extent of the services rendered, and there is no evidence

that any sum was paid, or any specific amount charged or agreed to be paid, nor any evidence of the fair and reasonable value of such services; therefore you are instructed to leave out of your verdict any assessment of damages for medical services. There being evidence, however, of money expended by plaintiff for medicines during his sickness, and should you find from the evidence that he is entitled to recover on account of the alleged injury, then it will be your duty to consider said evidence and allow plaintiff for money actually expended for medicine purchased by him on account of such injury."

The second instruction given on request of the plaintiff is complained of because it does not contain the word "reasonably" before the words "safe condition for use." The law undoubtedly is, that a city is only required to keep its sidewalks in a reasonably safe condition and can be held liable only for a failure to exercise ordinary care and prudence.

The fourth instruction given at the request of the defendant told the jury that if the walk in question was in a reasonably good and safe condition, to find for the defendant.

By the sixth instruction given on the request of the defendant the jury was informed that the defect must have left the sidewalk in an unreasonably dangerous condition before a verdict could be returned for the plaintiff.

The seventh instruction for the defendant stated "that the defendant was not required to have its sidewalks so constructed as to secure absolute immunity in using them; nor is it bound to employ the utmost care and exertion to that end. Its duty under the law is only to see that its sidewalks are *reasonably safe* for persons exercising ordinary care." We do not see how the defendant could have been prejudiced by the omission of the word "reasonably" from the instruction complained of, on account of its frequent and prominent use in the instructions given at the

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request of the city. All the instructions must be construed together. (*Campbell v. Holland*, 22 Neb., 587.)

The fifth, sixth, and seventh instructions given on the request of the plaintiff were based upon the evidence and stated the law correctly. There was evidence before the jury that the hole in the walk was filled with light, dry snow which concealed the defect. The missing plank in the walk was the proximate cause of the injury and, under the authorities cited elsewhere in this opinion, the fact that the defect was concealed by snow does not release the city from liability. These instructions complained of also stated the rule correctly in regard to notice to the city of the defect in the walk. (*City of Plattsmouth v. Mitchell*, 20 Neb., 228; *Waldron v. St. Paul*, 22 N. W. Rep., 4.)

Error is also assigned because the court gave the eighth instruction asked by the plaintiff. The first transcript of the record filed in the case in this court omitted from this instruction the words in italics. These words, however, were in the instruction when given by the trial court to the jury, as shown by the amended record now before us. The plaintiff in error since the filing of the amended record offers no criticism upon the instruction, and there being no apparent error therein we will give it no further consideration.

The second and third requests of the city were substantially covered by the instructions given to the jury and the court properly refused them.

Error is assigned upon the refusal to give the fifth, fourteenth, fifteenth, sixteenth, and eighteenth requests of the defendant. We do not think that the court erred in refusing them. So far as they stated the law correctly, and were based upon the evidence in the case, they were substantially given by being embodied in the instructions given. Some of these were not predicated upon the testimony and for that reason were properly refused. (*Fitzgerald v. Morrissey*, 14 Neb., 198.)

Complaint is also made of the refusal of the court to give the following instruction tendered by the city :

"Tenth—You are instructed that if the plaintiff by his own negligence directly contributed to the injury complained of, then he cannot recover. In reaching a conclusion upon this point it is important to consider the slippery condition of the sidewalk caused by the fall of snow, the fact that the injury occurred in the day time, and whether the defect in the sidewalk could have been observed by ordinary care and caution. If the injury was caused by the slippery condition of the sidewalk resulting from a recent fall of snow, or if the plaintiff by the use of ordinary care and prudence could have avoided the alleged defect in the sidewalk, then he cannot recover. (Refused ; exception by defendant.)"

This instruction assumes a fact not proven. There is no evidence in the record that the sidewalk was in a slippery condition caused by the fall of snow and it was rightly refused, for an instruction must be based upon the evidence and not assume facts that have not been proven.

It is urged that the court erred in refusing to give this instruction to the jury :

"Eleventh—If you find from the evidence that the alleged defect in the sidewalk existed at the time of the accident or injury complained of, but that the city had no actual notice of such defect, then, before you find for the plaintiff, it must appear that said defect had been notorious and continued for a length of time within which the city authorities in the exercise of reasonable care and diligence could have known the same. In deciding upon this question it is proper to consider the area and extent of the city of Lincoln and the number of miles of sidewalk subject to supervision and control of the city, as the existence of the defect in the sidewalks in a small town or village where the area and extent of sidewalks subject to supervision and control is small would naturally be discovered in a much

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shorter time by the municipality than would be the case in a large city of greater area and more extensive streets and sidewalks. (Refused; exception by defendant.)"

This request was properly refused, for two reasons: First, there was no evidence of the number of miles of sidewalk in the city; and, second, the care and diligence required of the city to keep its sidewalks in a reasonably safe condition for travel is not affected or varied by the number of miles of walk therein.

In *Lindsay v. City of Des Moines*, 27 N. W. Rep., 283, the court uses this language: "We think the court should not have allowed the defendant to prove that there are over 150 miles of sidewalk in the city of Des Moines and the jury ought not to have been instructed that the 'extent of sidewalk in the city which has to be looked after may be considered' in deciding whether the city officers used proper diligence in removing the snow and ice. It appears to us that the care and diligence required to keep sidewalks in proper condition cannot be affected or varied by the number of miles of walks in a city. If labor is necessary for the purpose, the force should be commensurate with the work to be done. In other words, a city with 40,000 inhabitants, and 150 miles of sidewalk, should be held to the same degree of care in this respect as the smaller towns with less extent of sidewalk."

The plaintiff in error makes no complaint in its brief for the refusal to give its twelfth and thirteenth requests, and we will leave them without comment.

Error is assigned because the court refused to give this instruction:

"Nineteenth—The jury are instructed that to maintain his action the plaintiff must prove that he had, before the filing of his petition, filed a statement giving the full name and the time, place, nature, and circumstances of the injury, or damage complained of, with the city clerk of the city of Lincoln. (Refused; exception by defendant.)"

Brownlee v. Davidson.

There was no error committed in denying the request. It was admitted by the pleadings that the plaintiff, before commencing his action, had filed with the city clerk of the city of Lincoln a statement giving the full name and the time, place, nature, and circumstances of the injury, and the damage complained of. This being admitted, the plaintiff was not required to prove the same.

The plaintiff in error has no substantial ground for complaint that the jury was not fairly instructed in its behalf. We have given careful consideration to the questions discussed upon the record, and finding no material error the judgment will be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JOHN BROWNLEE, EXR., ETC. V., JANE C. DAVIDSON.

[FILED FEBRUARY 18, 1890.]

1. Judgment: CORRECTION OF RECORD. A district court has power to correct at a subsequent term of court any errors or defects in the record of its judgments which occurred through the mistake or neglect of its clerk, so as to make the judgment entry correspond with the judgment actually rendered.
2. ———: ———: NOTICE: PRESUMPTION. Notice must be served on the opposite party of an application to correct such errors. It will be presumed that notice was given, in the absence of a showing to the contrary.
3. Deficiency Judgment: ERROR. Before error can be predicated upon the failure of a district court to render a deficiency judgment, it must appear that the court refused to render one when requested to do so.

ERROR to the district court for Otoe county. Tried below before CHAPMAN, J.

28	785
35	805
28	785
40	689
28	785
46	855
28	785
49	594
53	130
28	785
60	721

Edwin F. Warren, for plaintiff in error, cited : *Smith v. Pinney*, 2 Neb., 145; *McCann v. McLennan*, 3 Id., 27; *Pope v. Hooper*, 6 Id., 178; *Hansen v. Bergquist*, 9 Id.; 277; *Volland v. Wilcox*, 17 Id., 50.

D. T. Hayden, *contra*, cited : *Garrison v. People*, 6 Neb., 279; *Cook v. Moore*, 100 N. Car., 279.

NORVAL, J.

In 1887 an action was brought in the district court of Otoe county, by Ebenezer Brownlee in his lifetime, against the defendant Jane C. Davidson. From the allegations of the amended and supplemental petitions it appears that Mrs. Davidson owned the life estate in certain lands in Otoe and Nuckolls counties, and refused to keep the taxes paid thereon, and to protect their interests as remaindermen, the plaintiff Brownlee, for himself and others, paid the same, amounting to several hundred dollars. The object of this suit is stated in the prayer of the amended and supplemental petitions, thus :

"Wherefore plaintiff prays for a decree ordering, adjudging, and decreeing said sums of money, and the interest thereon, a lien upon the said described lands, and upon the interest of the said defendant therein, that unless the same shall be paid by a certain day, to be fixed by the court, that the interest of said defendant in and to said lands to-wit, her life estate therein, or so much thereof as may be necessary, may be sold as upon sales under mortgage foreclosure; that out of the proceeds arising from such sale there may be paid, first, the costs of this action, and of such sale; second, the sum so as aforesaid to be found due this plaintiff for taxes paid, and interest, and for such other or further order or relief in the premises as equity and good conscience may suggest, the circumstances of this case considered."

Brownlee v. Davidson.

The defendant answered, and on the 7th day of June, 1888, the court found the issues in favor of the plaintiff, and "adjudged, ordered, and decreed that the plaintiff have and recover of and from the said defendant the sum of \$970.89 and costs; and it is further ordered, adjudged, and decreed that said plaintiff have a lien upon the interest of the defendant in said premises for said sum so found due and costs." The remainder of the decree is the same as in mortgage foreclosures.

On the last day of the succeeding term of court in Otoe county, to-wit, November 16, 1888, the defendant filed with the clerk of said court his application for the correction of said journal entry, stating therein, among other grounds, "that by a mistake in the preparation of said decree * * * a personal judgment was rendered against said defendant, and in favor of said plaintiff for the aforesaid sum, whereas no such judgment or finding has been entered by said court, or asked for in plaintiff's petition, but that the same was an error and mistake which should be corrected by this court."

On the 4th day of January, 1889, the plaintiff procured an order of sale to be issued on said decree, the Otoe county lands were sold thereunder, sale confirmed, and the sheriff ordered to execute a deed to the purchaser at said sale.

On the 2d day of May, 1889, the said district court entered upon its journal the following correction of the journal entry of June 7, 1888, to-wit: "This cause came on for hearing on the motion of the defendant to modify the decree and correct the entry of judgment heretofore made in this case, which motion was duly submitted to the court at the November term, 1888, thereof. And the court, being well advised in the premises, doth find that on the 7th day of June, 1888, a decree was entered in the above case in favor of the plaintiff, and against the defendant, for the sale of the defendant's life estate in certain lands in the

Brownlee v. Davidson.

state of Nebraska, described in plaintiff's petition, but that by an error or mistake of the party preparing the decree in said case a personal judgment was entered against the said defendant, whereas no personal judgment was rendered or intended to be rendered by the court against the defendant in said cause. It is therefore considered and ordered by the court that the said decree and the entry of said judgment be modified and corrected to conform to the original findings of the court, so that the plaintiff shall have a lien only upon the life estate of the defendant in said lands, and that the same be sold to pay the sums found due by said decree, and that all that portion of said decree purporting to render a personal judgment against said defendant should be and the same is hereby set aside."

On the 13th day of May, 1889, the plaintiff filed a motion to have this last decree vacated because the district court had no jurisdiction at that time to make such entry, and that the original judgment was right and proper. This motion of the plaintiff was overruled on the 17th day of June, 1889. The plaintiff took an exception and brings the case here by petition in error. Ebenezer Brownlee having died since the entry of the decree in the lower court, the cause was revived in this court in the name of his executor, John Brownlee.

It is urged that the original decree corresponds with the one actually rendered. The finding in the modified decree does not sustain this position. It states "that by an error or mistake of the party preparing the decree in said cause a personal judgment was entered against the said defendant, whereas no personal judgment was rendered or intended to be rendered by the court against the defendant." Whether this finding was based upon the recollection of the learned district judge, his entry on the trial docket, or on evidence taken, is not disclosed by the record. The evidence not being before us, the presumption is that the finding of the court is supported by the evidence.

The principal question presented by the record is, Did the district court have the power to amend the journal entry of the decree? It is firmly settled that a court of general jurisdiction, like the district court, has ample power at a subsequent term to correct any errors or defects in the record of its judgments or decrees which occur through the mistake or neglect of the clerk of the court, so as to make the judgment entry correspond with the judgment actually rendered. This authority in this state is expressly conferred by statute. Subdivision 3 of sec. 602 of the Code authorizes the district court to vacate or modify its own decrees after the term at which it was rendered, "for the mistake, neglect, or omission of the clerk." Proceedings for that purpose must be commenced within three years after the rendition of the decree. (Sec. 609.) In the case of *Garrison v. People*, 6 Neb., 274, the power of the district court to correct mistakes of the clerk after the term, was recognized in a criminal case.

The plaintiff in error claims in his brief that he had no notice of the defendant's motion to modify the decree. While such a notice is necessary, yet in the absence of a showing to the contrary it will be presumed that one was given to the plaintiff. (*Hansen v. Bergquist*, 9 Neb., 269.)

It is contended that the plaintiff was entitled to a deficiency judgment after the sale of the lands under the decree. It does not appear that the lower court was requested to render such a judgment. The plaintiff's motion simply asked to have vacated the modified decree. Error cannot be predicated on the failure to render a deficiency judgment until the district court has refused to render one. It is doubtful, however, whether a deficiency judgment can be rendered in a case like this. No error appearing in the record, the modified decree of the district court is affirmed.

DECREE AFFIRMED.

THE other judges concur.

Brownlee v. Davidson.

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DECREE AFFIRMED.

THE other judges concur.

CHRISTIANA E. HENDRICKSON V. ALBERT N. SULLIVAN.

[FILED FEBRUARY 18, 1890.]

1. **Error Proceedings: DISMISSAL.** When all parties to a joint judgment have not been brought before a reviewing court in proceedings in error, as either plaintiff or defendant, and no excuse is given for not doing so, the defendant may have the case dismissed.
2. ———: **SUMMONS: NEED NOT BE SERVED WITHIN A YEAR.** It is not necessary that a summons in error should be served within one year from the date of the rendition of the judgment sought to be reversed. If the summons that is served is issued within the year it is sufficient.

MOTION to dismiss.

A. N. Sullivan, for the motion.*Adams, Lansing & Scott, contra.*

NORVAL, J.

The plaintiff in error, Christiana E. Hendrickson, sued the defendants in error, Albert N. Sullivan and Allen Beeson, in the district court of Cass county on a cause of action joint in form. The cause was tried to a jury and a verdict returned finding for both the defendants. Judgment was rendered on the verdict in favor of the defendants and against the plaintiff on the 21st day of December, 1887. On this 20th day of December, 1888, a petition in error was filed in this court by the said Christiana E. Hendrickson, and on said day a summons in error was duly issued against said Sullivan and Beeson, which was served on the defendant Sullivan only on the 12th day of January, 1889. No service was ever obtained or attempted on the defendant Beeson, nor has he made any appearance in the cause in this court.

28 790
29 620
30 790
31 264
32 790
33 788
34 888
35 790
36 797
37 790
38 798
39 577
40 790
41 300

Hendrickson v. Sullivan.

The defendant in error Sullivan moves to dismiss the cause for the following reasons :

1. No service of summons has been made upon his co-defendant Allen Beeson.

2. That service of summons was not had on this defendant within one year from the rendition of the judgment sought to be reversed.

The failure to serve the summons in error within one year from the date of the judgment is no cause for dismissing the case. This court has so held in the case of *Rogers v. Redick*, 10 Neb., 332. The following is the third clause of the syllabus in the case : "A summons in error must be issued within one year from the date of the judgment or final order sought to be reviewed, although it may be served afterwards."

The first point in the motion to dismiss is well taken. The judgment of the district court is a joint one, in favor of both the defendants. No excuse is given for the failure to obtain service on the defendant Beeson, and the time has now elapsed in which a summons in error can be issued. All the parties in a joint judgment are necessary parties to proceedings in error brought to reverse such judgment, and must be made so, as either plaintiffs or defendants in error. (Powell on Appellate Proceedings, 273 ; *Smetters v. Rainey*, 14 O. S., 287 ; *Simpson v. Greeley*, 20 Wall., 152.) The failure to serve a summons in error on Beeson releases him from liability on the plaintiff's cause of action, and the release of Beeson also releases his co-defendant Sullivan.

The motion to dismiss must be sustained.

MOTION SUSTAINED.

THE other judges concur.

C. JOHNSON ET AL. V. FIRST NATIONAL BANK.

[FILED FEBRUARY 19, 1890.]

1. **Negotiable Instruments: ALTERATION: ADMISSIBILITY IN EVIDENCE.** A note was dated August 1, 1886, due five months from date. In an action by an indorsee commenced April 30, 1888, plaintiff offered said note and the indorsement thereon in evidence, which was admitted over objection of defendants, they having set up as a defense the want of consideration for the note and that it was indorsed after maturity. Upon inspection of the note, the original being preserved in the bill of exceptions, it is apparent that the indorsement was first written with a lead pencil and dated "Oct. 1, 1887," which writing was partially erased and rewritten with pen and ink and dated "Oct. 15 '87," and afterwards the figure 7 was altered to a 6. *Held*, Wrongly admitted.
2. **Pleadings: NOT ADMISSIBLE IN EVIDENCE.** The admission in evidence of the original petition in the case offered by plaintiff, *Held*, error.

ERROR to the district court for Phelps county. Tried below before GASLIN, J.

James I. Rhea, for plaintiffs in error :

No foundation was laid for the admission of the indorsement by the treasurer of the Bridge Company, as he was not shown to have had the authority to make it. (Boone, Corporations, sec. 143; *Jackson v. Campbell*, 5 Wend. [N. Y.], 572; *Knight v. Lang*, 2 Abb. Pr. [N. Y.], 227.) The alteration casts a suspicion on the indorsement, and imposes on defendant in error the burden of proving that the same was made before maturity. (1 Greenleaf, Ev., sec. 564; Randolph, Commercial Paper, secs. 82, 686.) Pleadings are admissible in evidence only as admissions. (1 Greenleaf, Ev., sec. 205; Boone, Code Pleading, secs. 2, 214.) They are not "for the jury" (Thompson on Trials, secs. 1027, 2314; Maxwell, Pl. & Pr. [81 Ed.], p. 385);

28	798
30	538
28	792
049	453
52	709

and a party cannot introduce his own pleadings in evidence unless they have been first introduced by the opposite party. (*Fugate v. Carter*, 6 Mo., 267.) The Illinois cases cited by defendant in error virtually decide that authority to indorse will not be presumed if called in question.

Hall & Patrick, and *J. H. Linderman*, contra:

An indorsement is presumed to be regular, and to have been made in the ordinary course of business. (*McIntyre v. Preston*, 5 Gilm. [Ill.], 48.) The treasurer is the proper officer to indorse (*Morawetz*, Private Corporations, secs. 321, 509; *Fay v. Noble*, 12 Cush. [Mass.], 1; *Lester v. Webb*, 1 Allen [Mass.], 34; *Hutchings v. Ladd*, 16 Mich., 493); and third persons may act upon his indorsement as if authorized by the corporation. (*Walker v. Detroit, etc., Co.*, 47 Mich., 338 [11 N. W. Rep., 187].) The indorsement need not even disclose the name of the officer making it. (*Templeton v. Hayward*, 65 Ill., 178; *Walker v. Krebaum*, 67 Id., 252.) Cases cited by plaintiffs in error on this point seem to have been those where it was sought to charge a corporation on an unauthorized act. Pleadings are for the jury and their introduction in evidence does not make them more weighty.

COBB, CH. J.

The defendant in error alleged in the district court of Phelps county that it was and is a corporation, doing a banking business under the laws of the United States, located at Plum Creek in Dawson county.

II. That on August 1, 1886, the plaintiffs in error made and delivered to the Overton Bridge Company their promissory note in writing as follows:

"\$50. OVERTON, NEBRASKA, Aug't 1, 1886.

"Five months after date, for value received, we, or either of us, promise to pay to the order of The Overton Bridge

Johnson v. Bank.

Company fifty dollars, at the office of its treasurer at Overton, Nebr., with interest at 10 per cent from date. It is expressly understood and agreed that all the makers of this note are principals thereon.

"C. JOHNSON.

"C. L. JOHNSON.

"Witness: _____."

III. That on the —— day of ——, 1886, The Overton Bridge Company indorsed said note as follows: "Pay the First National Bank: Overton Bridge Company, E. M. Tefang, treasurer," and delivered and transferred it to the defendant in error, who became the owner thereof for value; that no part has been paid, and that there is due thereon the original sum, with interest from date, for which suit is brought.

The defendants in the court below answered, denying the allegations of the plaintiff's petition, except as herein admitted; they admit the note set forth, but aver that the plaintiff became the holder after maturity; that the note is without consideration, of which the plaintiff had notice.

That the note was executed to the Bridge Company as a donation or subscription, conditioned that the Bridge Company build a wagon bridge over the Platte river at a point intersecting the half section line running north and south through sections 1 and 12, in town 8 north, range 20 west; that the company procure the right of way and open a public highway through said sections on the half section line; that the bridge be completed by January 1, 1887, no tolls to be charged; which conditions were not complied with, but the terms of all of which were violated.

The plaintiff replied, denying each and every allegation of the defendants' answer.

There was a trial to a jury, with findings for the plaintiff and verdict for \$50. The defendants' motion for a new trial being overruled, judgment was entered on the verdict, and to which the defendants excepted.

I. That the court erred in admitting in evidence to the jury the indorsement of the note.

II. In admitting in evidence, as proof, the plaintiff's petition.

III. In excluding the testimony of defendant C. L. Johnson.

IV. The verdict is contrary to law, and is not sustained by the evidence.

The petition in the court below contained no allegation that the note sued on was transferred to the plaintiff by indorsement of the Bridge Company, or otherwise, before maturity. The pleader inserted a clause, apparently for the purpose of setting out the day, month, and year of the making of the indorsement of the note by the Bridge Company, but he failed to insert either the day or the month, leaving the appropriate places therein for the same blank, but did insert the figures 1886 as the year. The note bearing date August 1, 1886, and payable five months after date, as a matter of fact, if it was indorsed on any day in said year, it was indorsed before maturity; so that, by a liberal construction of the statute prescribing our most liberal system of pleading, an allegation that the indorsement was made in 1886 might, especially after verdict, be construed to be an allegation that the note was transferred to the plaintiff by indorsement before maturity.

The defendants, by their answer, alleged a want of consideration for the said note and denied that it was transferred by indorsement before delivery. These allegations taken together constitute a defense, and if proved would defeat the action.

Upon the trial the plaintiff offered in evidence the note and the indorsement, which, over the objection of the defendants, were admitted. The objection of defendants not being specific, must be held to apply as well to the indorsement in its changed and mutilated condition as to the note thus indorsed. I doubt the admissibility of the in-

Johnson v. Bank.

dorsement without evidence explaining the alteration therein apparent upon the face, or rather upon the back, of the instrument. The indorsement was evidently first written with a lead pencil and dated "Oct. 1, 1887;" this was partially erased and rewritten with pen and ink and dated "Oct. 15/87," and afterwards the figure 7 changed to a 6. These changes are visible to the naked eye. As the action was commenced in justice's court on the 31st day of May, 1888, the presumption is so strong that the true date of the indorsement is that of the original, or lead pencil writing, that, one of the issues in the case being that the note was indorsed after maturity, the trial court should have required evidence explaining the alteration or alterations in the date of the indorsement before admitting it in evidence.

II. The plaintiff offered in evidence the petition in the case, which, over the objection of the defendants, was admitted. I know of no rule of evidence under which this instrument was admissible, and there are serious objections to such practice. This petition had been verified by the oath of J. H. Lindeman as attorney for the plaintiff. By the means here resorted to the plaintiff was enabled to avail itself, before the jury, of the benefit of Mr. Lindeman's oath, upon the facts stated in the petition, without his being subjected to a cross-examination, and it further takes the benefit of the belief, or opinion, of Mr. Lindeman as to the truth of the facts stated in the petition, which he would not have been permitted to give on the stand as a witness for the plaintiff. It is true that the pleadings in a case on trial are, under our practice, permitted to go before the jury, not as evidence, but to show the issues thereby made and presented. There was evidence on the part of the defendants very clearly establishing the defense of the want of consideration for the note, thus narrowing the right of the plaintiff to recover to the single issue of indorsement before maturity.

C. L. Johnson, one of the defendants, testified on behalf

of himself and co-defendant that in the month of January, 1887, he saw the note sued on in the hands of one George Crandall, and that there "was no indorsement on the back of the note at that time." This witness was asked the question, in reference to George Crandall at the time spoken of when he had this note in his possession, "State who, if any one, he was representing at that time." This question being objected to, was ruled out by the court. The purpose of asking this question was evidently to prove that some time in the month of January, 1887, after the maturity of the note, Mr. Crandall was acting as the agent of the payee of the note and had it unindorsed in his actual possession and therefore in the legal possession of his principal. The answer to this question would probably have shed light upon the somewhat doubtful date of the indorsement, and should have been permitted to be answered; but as defendants made no offer of this evidence after the sustaining of the objection by the court, under the decisions such ruling is not available to the defendant as ground of reversal.

But for the errors of admitting the indorsement in evidence without accompanying evidence explaining the change in its date, and of admitting the petition in evidence, there must be a new trial.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

State, ex rel. Stange, v. Cochran.

28 798
444 252STATE, EX REL. ALBERT H. STANGE, V. SAMUEL T.
COCHRAN.

[FILED FEBRUARY 12, 1890.]

1. Stay of Execution: UNDERTAKING: PRINCIPAL NEED NOT SIGN. To obtain a stay of execution on a judgment rendered by a justice of the peace, it is sufficient if, within ten days after the rendition of the judgment, a surety, approved by the justice, enter on the justice's docket into an undertaking with the adverse party "conditioned for the payment of the amount of such judgment, interest, and costs, and costs that may accrue." The judgment debtor need not sign the undertaking.
2. Undertaking examined and held sufficient.

ORIGINAL application for *mandamus*.*Chapman & Geisthardt*, for relator:

An instrument to be upheld as a statutory bond must comply with all material requirements of the statute. (*Culler v. Roberts*, 7 Neb., 4; *Gregory v. Cameron*, Id., 414.) One of the requirements of the present law is that "the person against whom judgment may be rendered" enter into an undertaking; and this law is substantially the same as that construed in *Gregory v. Cameron*. (Code, sec. 1049; sec. 481 [repealed 1875].) One required by statute to give a bond must join in the same as principal or it will be void. (*People v. Hartley*, 21 Cal., 585 [82 Am. Dec., 758].) Only the statutory bond will suffice for the purpose (*Gregory v. Cameron*, *supra*); but the writing is void even as a common law bond, being without consideration, and without parties on both sides. The absence of the principal is not an irregularity which can be cured under sec. 144 of the Code.

Stevens & Love, contra:

State, ex rel. Stange, v. Cochran.

A bond, though faulty, and not conforming strictly to the requirements of the statute, becomes operative when approved by the proper officer. (*Tessier v. Crowley*, 17 Neb., 210.) In the Nebraska cases cited by relator the bond was not so approved. Even if not valid as a statutory stay, the bond in this case was duly amended in conformity to sec. 144 of the Code. (*State, ex rel. Cleary, v. Russell*, 17 Neb., 201; *Cusey v. Peebles*, 13 Id., 9.) If the sureties were deemed insufficient, or the bond faulty, the objection should have been presented below by motion; *mandamus* is not the proper remedy.

MAXWELL, J.

On the 30th day of October, 1889, the relator recovered a judgment against John Bowlby and John Knox before the respondent, a justice of the peace.

On the 4th day of November thereafter the judgment debtors caused to be filed with said justice an undertaking for the stay of execution, as follows:

"A. H. STRANGE

v.

ALLEN BOWLBY AND JOHN
KNOX, partners doing business under the firm name
of Bowlby & Knox.

"We do hereby acknowledge ourselves sureties for the defendants herein, for the payment of the judgment and costs, and interest thereon, rendered by the justice court of the state of Nebraska, in and for city of Lincoln, Lancaster county, in the above entitled action, on the 29th day of October, A. D. 1889, against said defendants, for the purpose of a stay of execution thereon for six months, and to that end we hereby undertake and promise to pay the said judgment, interest, and costs that may accrue at or before the expiration of the said term of the stay of execution, and upon the expiration of said term hereby authorize

State, ex rel. Stange, v. Cochran.

and empower the justice of said court to issue execution against us as provided by law.

Dated at Lincoln, the 6th day of November, A. D. 1889.

"W. T. STEVENS.

"D. L. LOVE.

"THE STATE OF NEBRASKA, } ss.
LANCASTER COUNTY,

"W. T. Stevens and D. L. Love, being duly sworn, depose and say that we are residents and householders and freeholders within Lancaster county, in the state of Nebraska; that we are sureties in the foregoing bond; that we are worth in real estate therein the sum of \$500 beyond the amount of our debts, and that we have property liable to execution in the state of Nebraska equal to \$500.

"W. T. STEVENS.

"D. L. LOVE.

"Sworn to before me in my presence by W. T. Stevens and D. L. Love this 6th day of November, 1889.

"S. T. COCHRAN,

"Justice of the Peace."

"The foregoing recognizance and sureties taken and approved by me this 6th day of November, A. D. 1889.

"S. T. COCHRAN,

"Justice of the Peace."

It is claimed that the instrument in question is void because not signed by the principal debtors, and *Gregory v. Cameron*, 7 Neb., 414, is cited to sustain that position. In that case the judgment exceeded \$100, and in such case where judgment was rendered in the county court the provisions for staying execution were the same as in the district court. (Gen. Statutes of 1873, p. 267.) Section 481 of the Code as it existed at that time required the judgment debtor, in order to obtain a stay of execution, to enter into a bond to the plaintiff with one or more sufficient sureties, etc. The court held, and properly, that the instrument filed in that case was not a bond, and therefore not a compliance with the statute.

McKeighan v. Graves.

Section 1049 of the Code, however, does not require the judgment debtor to give a bond, but merely to procure the undertaking of one or more sureties, resident of the county, as the justice shall approve, "conditioned for the payment of the amount of the judgment, interest, and costs, and costs that may accrue."

The undertaking in question contains more than the statute requires. Whether some of its provisions could be carried into effect we need not now stop to inquire. It does provide that the sureties will pay the judgment, interest, and costs, and costs that may accrue, and is signed by them. The principal is not required to sign the undertaking, and we have no authority nor inclination to inject words into the statute.

It is apparent that the stay is a valid obligation, and the writ is therefore denied.

WRIT DENIED.

THE other judges concur.

W. A. McKEIGHAN ET AL. V. JOSEPH GRAVES.

[FILED FEBRUARY 19, 1890.]

Review: EVIDENCE. In a case tried before a justice of the peace and taken on error to the district court and there affirmed, and from that judgment brought on error to the supreme court, the only evidence before the district and supreme courts being the transcript of the justice, from which it appears that there was no error in the judgment, it will be affirmed as of course.

ERROR to the district court for Webster county. Tried below before GASLIN, J.

Case & McNeny, and Kaley Bros., for plaintiff in error.

G. R. Chaney, contra.

MAXWELL, J.

This action was brought before a justice of the peace and judgment was rendered against the plaintiffs in error and in favor of the defendant in error. The case was then taken on error to the district court, where the judgment of the justice was affirmed.

The case is brought into this court on the transcript of the justice, which is as follows:

"November 7, 1887, plaintiff filed as his bill of particulars two notes, praying for judgment thereon for the sum of \$138.60 with interest thereon. Issued summons of this date returnable November 17, 1887, at 10 o'clock A. M., and delivered same to H. C. Scott, sheriff, November 17, 1887. Summons returned indorsed: 'We hereby accept service on the within summons. W. A. McKeighan, Thad. Arnold.'

"November 17, 1887, at the hour set for the hearing of this cause, parties appear; defendants filed affidavit for continuance for thirty days to obtain the testimony of John Arnold; continuance granted, and this cause set for hearing December 16, 1887, at 10 o'clock A. M.

"December 16, 1887, at the hour set for the hearing of this cause plaintiff appears; defendant W. A. McKeighan appears; defendant Thad. Arnold not appearing then nor for one hour thereafter, his default is recorded. Plaintiff then introduced in evidence the notes sued on and demands judgment thereon for the sum of \$152.10 as principal and interest on said notes, defendants offering no evidence. I therefore find there is due and owing plaintiff from defendants W. A. McKeighan and Thad. Arnold the sum of \$152.10 as principal and interest on said notes. It is therefore considered, ordered, and adjudged by the court that the plaintiff have and recover of and from defendants W. A.

State v. Faber.

McKeighan and Thad. Arnold the said sum of \$152.10 as principal and interest on said notes sued on, and his costs herein expended taxed at \$1.90, and that this judgment draw 10 per cent from date hereof."

No particular objection to the judgment is pointed out and none is apparent from an inspection of the transcript. The case has the appearance of an appeal in order to delay the collection of the judgment, but however that may be, the judgment appears to be right and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

STATE V. MONS. ED. FABER.

28	803
49	779

[FILED FEBRUARY 19, 1890.]

LIQUORS: MINIMUM FINE: COURT CANNOT REDUCE. The law fixes the minimum fine for selling intoxicating liquors without license at \$100 for each offense. Where, therefore, a party was found guilty on seven counts in an information for selling such liquor without a license, and a fine of \$100 for each offense—being \$700—was imposed, the court cannot afterward reduce such fine.

EXCEPTIONS from the district court for Harlan county, GASLIN, J., presiding. Filed under the provisions of section 515, Criminal Code.

C. C. Flansburg, for plaintiff in error:

The sentence must conform to the statute and its special requirements. (*Warfield v. State*, 34 Ala., 261; *State v. Sanford*, 20 Ark., 145; *People v. Sacramento*, 6 Cal., 422; *Barth v. State*, 18 Conn., 432; *State v. Harding*, 39 Id., 561; *McMeekin v. State*, 48 Ga., 335; *Ex parte Bollig*, 31

State v. Faber.

Ill., 88; *Ex parte Tongate*, 31 Ind., 370; *Rawlings v. State*, 2 Md., 201; *Commonwealth v. Howard*, 13 Mass., 221; *People v. Ontario*, 4 Denio [N. Y.], 260; *Werfeld v. Commonwealth*, 5 Binn. [Pa.], 65.) The court has no authority to remit any part of the fine in a criminal case. (*Luckey v. State*, 14 Tenn., 400.)

T. J. Ferguson, and *L. H. Kent*, *contra*, filed no brief.

MAXWELL, J.

An information containing eleven counts for selling intoxicating liquors without license was filed against the defendant in the district court of Harlan county. On being arraigned the defendant pleaded not guilty. A trial was thereupon had and the jury found him guilty on the 1st, 2d, 3d, 4th, 5th, 6th, and 11th counts of said information, and not guilty on the other counts thereof. The court thereupon sentenced him to pay a fine of \$700 and the costs of prosecution, and to stand committed "until such fine and costs be paid, or otherwise be discharged by law." Afterwards the court, with the consent of the county attorney, remitted from said sentence the sum of \$300.

The question presented to this court is the authority of the district court to remit a portion of the judgment.

Sec. 11, chap. 50, Compiled Statutes, provides that "All persons who shall sell or give away, upon any pretext, malt, spirituous, or vinous liquors, or any intoxicating drinks, without having first complied with the provisions of this act, and obtained license as herein set forth, shall for each offense be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than \$100, nor more than \$500, or be imprisoned not to exceed one month in the county jail, and shall be liable in all respects to the public and to individuals, the same as he would have been had he given bonds and obtained license as herein provided; *Provided*, That any person or persons shall be allowed to

sell wine made from grapes grown or raised by said person or persons * * * in the state of Nebraska, the same to be sold in quantities not less than one gallon, without procuring the license provided for in this chapter."

It will be observed that the minimum fine fixed by the statute is \$100 "for each offense." This being so the court cannot reduce it below that sum.

The law places in the hands of the court the power to grant a new trial when for any cause a fair trial has not been had, the design being to protect the innocent. The law, in effect, says to every judge, "It is your duty to see that every person tried before you on a criminal charge has a fair trial before an impartial jury, and that the evidence is sufficient in case of conviction to sustain the verdict. These matters necessarily must be left to a great extent to the integrity and independence of character of the judge. Where, however, he overrules a motion for a new trial, if such motion is filed, and imposes the lowest punishment fixed by statute, he has no further power to reduce the sentence.

The attempted reduction of sentence in this case, therefore, was a nullity and the defendant is still liable for the amount attempted to be remitted.

JUDGMENT ACCORDINGLY.

THE other judges concur.

T. R. WALLACE, EXR., v. A. S. THRESHER.

[FILED FEBRUARY 19, 1890.]

1. Review: EVIDENCE. The only error assigned was, in effect, that the verdict was against the weight of evidence. *Held*, That while the evidence was conflicting, yet a clear preponderance thereof sustained the verdict.

ERROR to the district court for Howard county. Tried below before HARRISON, J.

T. R. Wallace, and *Henry Nunn*, for plaintiff in error.

Darnall & Kendall, contra.

MAXWELL, J.

This action was brought on a promissory note made by the defendant November 1, 1885, for the sum of \$300, in favor of one Hurst. Since the making of the note Hurst died and the plaintiff is executor under the will.

The defendant, in answer to the petition, alleges that to secure said note he executed to Hurst a chattel mortgage upon his growing crops and seeds, and that after the note became due Hurst took possession of the mortgaged property of the value of \$534.15 and credited the same on said note. It is also alleged that Hurst gave to the wife of defendant in error a certain portion of said property.

The reply admits the payment of \$20.75 on the note and denies the other allegations of the answer.

On the trial of the cause the jury returned a verdict for the defendant, and a motion for a new trial having been overruled, judgment was entered on the verdict. The only question for determination here is whether or not the evidence sustains the verdict.

 Howell v. Hathaway.

The evidence is conflicting, but the preponderance thereof is clearly in support of the verdict. It is unnecessary to review the evidence at length.

The verdict and judgment are right and are affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

28	807
30	88
28	807
44	840

SPoonER R. HOWELL, APPELLANT, v. T. A. HATHAWAY
ET AL., APPELLEES.

[FILED FEBRUARY 19, 1890.]

1. **Mechanics' Liens: WIFE'S PROPERTY.** Where lumber and building material were furnished to a husband for the erection of a dwelling-house for himself and wife, and which lumber and material were so used, the legal title of the lot, however, being in the wife; the testimony showed that she knew that the lumber was being furnished for the purpose named, and by whom, and the size and style of the house, and that she made no objections; there was no proof as to how she acquired title to the lot in question, whether as a gift from her husband or had paid for the same with her own means: *Held*, That the property was subject to a mechanic's lien for such lumber and material.

2. ———: ———. *Held*, That the proof tended to show the acquiescence of the wife in the contract of the husband.

APPEAL from the district court for Hall county. Heard below before TIFFANY, J.

O. A. Abbott, for appellant, cited: *Thompson v. Davenport*, 9 B. & C., 78 [2 Smith's Leading Cases, 377*]; *North v. LaFlesh*, 73 Wis., 520 [41 N. W. Rep., 633].

Darnall & Babcock, and *L. M. Whitney*, *contra*.

MAXWELL, J.

This is an action to foreclose a mechanic's lien.

The plaintiff in error is a dealer in lumber and building material, and furnished to one Moore, who had contracted with T. A. Hathaway to build a house on a certain lot, the building material necessary to erect the house. Before the lumber was all furnished, Mr. Hathaway called upon the plaintiff in error and stated that he would pay for the lumber and other material furnished to build said house.

The testimony shows that the value of such material was the sum of \$665.10, of which sum T. A. Hathaway had paid before judgment the sum of \$500.

Annie L. Hathaway, the wife of T. A. Hathaway, in her answer claims to be the owner of the lot on which the building stands, and denies that she entered into a contract with the plaintiff in error for said material.

On the trial of the cause the court found the issues in favor of Annie L. Hathaway; that is, found that the plaintiff in error did not have a mechanic's lien on the property in question and dismissed the action as to her.

The court also rendered judgment in favor of the plaintiff in error and against T. A. Hathaway for \$165.10 and interest.

The only question for determination is, Did the plaintiff in error have a lien on the house?

The only witness called on behalf of the defendants was T. A. Hathaway, the husband of Annie, who testifies that the lumber was furnished for the house in question and that he and his wife were living in the house; that his wife knew at the time it was being built the size and style thereof, and that she knew that the plaintiff in error was furnishing the lumber of which the house was constructed.

The testimony also shows that the legal title to the lot in question is in the name of the wife, Annie L. Whether she in fact purchased it with her own money does not ap-

pear, neither does the evidence show any facts as to the manner in which she acquired it. For aught that appears her husband may have bought the lot and paid for it, but put the legal title in the name of his wife. She now claims the lot with the house thereon as her property without showing any facts as to how she acquired title. If the lot was a mere gift from her husband and he caused a house to be built thereon, of which she had full notice, she certainly could not retain the house without paying for it.

While courts will protect a wife as far as possible in the enjoyment of their own separate estate, yet they cannot permit her to acquire as donee and retain property from her husband free from the claims of creditors where such property in the hands of the husband would be liable for his debts. To entitle her to protection in that regard she must be a *bona fide* purchaser for value. (*Monteith v. Bax*, 4 Neb., 160; *Williams v. Evans*, 6 Id., 217; *First Nat'l Bank v. Bartlett*, 8 Id., 319.)

In *McCormick v. Lawton*, 3 Neb., 449, where the contract was made with the husband the property was held to be subject to a mechanic's lien. MASON, Ch. J., says, p. 452: "It clearly appears from the record before us that John McCormick, the assignee of McCoy of the lot and premises, had full knowledge of the work done and material furnished by Lawton, and that the same were not paid for. All these plaintiffs in error took such interest as they possess, charged with all the equities of the defendants in error.

"When the wife is the owner of the fee of the lots, and the husband contracts for the erection of a dwelling-house on the same, and the wife gives directions and instructions to the workmen, as to the kind and character of dwelling to erect, and the manner in which the work shall be done, in the absence of counteracting proof it will be presumed that the husband acted as the agent of the wife in entering into such contract.

Richardson County v. Hull

"This view of the case is certainly greatly strengthened by our statutes, which provide that any real estate belonging to a married woman may be managed, controlled, leased, demised, or conveyed by her, by will or by deed, in the same manner and with the same effect as if she were single. (Revised Statutes, 1866, chap. 43, sec. 47.)"

The same rule was applied in *Scales v. Paine*, 13 Neb., 521.

These cases, in our view, state the law correctly and will be adhered to, and they are decisive of this case.

The judgment of the district court, so far as Annie L. Hathaway is concerned, is reversed and a decree foreclosing the lien will be entered in this court.

JUDGMENT ACCORDINGLY.

THE other judges concur.

28	810
33	733
28	810
48	307
28	810
58	276

RICHARDSON COUNTY V. H. T. HULL.

[FILED FEBRUARY 19, 1890.]

COUNTIES: ACTIONS AGAINST: CLAIMS. A cause of action against a county under the provisions of section 71 of the revenue act of 1869 is a claim against a county within the meaning of section 37 and chapter 18 of the Compiled Statutes, and no action can be maintained on such claim other than by presenting the same to the county board for audit and allowance. (*Richardson Co. v. Hull*, 24 Neb., 536.)

ERROR to the district court for Richardson county.
Tried below before APPELGET, J.

E. A. Tucker, for plaintiff in error, cited: *Brown v. Otoe County*, 6 Neb., 111; *State, ex rel. Clark, v. Buffalo County*, 6 Id., 454; *Dixon County v. Barnes*, 13 Id., 294;

Richardson County v. Hull.

McCann v. Sierra County, 7 Cal., 121; *State, ex rel. Williams, v. Bonebrake*, 4 Kan., 247; *Jackson County v. La Crosse County*, 13 Wis., 548; *Com'rs v. Zeigelhofer*, 38 Ohio St., 523; *In re Inhabitants of Windham*, 32 Me., 452; *Fulton County v. Maxwell*, 101 Ind., 268; *White County Com'rs v. Karp*, 90 Id., 236; *Bryan v. Moore*, 81 Id., 9; *State v. Hamilton*, 26 Ohio St., 364; *Snelson v. State*, 16 Ind., 29; *Waugh v. Chauncey*, 13 Cal., 11; *People v. Stocking*, 50 Barb. [N. Y.], 573; *Colusa Co. v. DeJarnett*, 55 Cal., 373; *Brewer v. Otoe County*, 1 Neb., 382; *S. C. & P. R. Co. v. Washington County*, 3 Id., 38; *Clark v. Dayton*, 6 Id., 203; *Parker v. Matheson*, 21 Id., 546.

E. W. Thomas, and C. Gillespie, contra, cited: *Kaeiser v. Nuckolls County*, 14 Neb., 277; *Roberts v. Adams County*, 20 Id., 409; *Stringham v. Board*, 24 Wis., 594; *McCoy v. Washington County*, 3 Wall., Jr. [U. S.], 381; *Cowles v. Mercer County*, 7 Wall. [U. S.], 118; *Board v. Hurd* 49 Ga., 462; *Boone, Corporations*, sec. 321; *May v. Saginaw County*, 32 Fed. Rep., 639; *Brady v. Supervisors*, 10 N. Y., 260; *Endress v. Chippewa County*, 43 Mich., 317 [5 N. W. Rep., 632]; *Spencer v. Sulley County*, 33 N. W. Rep. [Dak.], 97; *Chick v. Newberry Co.*, 3 S. E. Rep. [S. Car.], 787; *Waitz v. Ormsby*, 1 Nev., 376; *Donalson v. San Miguel Co.*, 1 N. M., 263; *Klaise v. State*, 27 Wis., 462; *Clear L. Waterworks Co. v. Lake Co.*, 45 Cal., 90.

NORVAL, J.

Upon the filing of the opinion in this case (24 Neb., 536) a motion for a rehearing was filed on behalf of the defendant in error, and a rehearing having been granted, it has been resubmitted. The action was brought by Hull to recover of the county \$509.43 which had been paid by him for taxes upon a tract of land not subject to taxes. There is but one question in the case and that is, whether the cause of action is of such a nature that it should first have

Richardson County v. Hull

been presented to the county board for allowance. Upon a careful review of the authorities by Judge COBB in the former opinion, it was held that the cause of action was a claim within the meaning of the statute, and that no action could be maintained thereon other than by presenting the same to the county board for audit and allowance. We are entirely satisfied with the conclusions there reached. We shall not attempt a review of the authorities cited by the defendant in error from other states. They are either from states having statutes different from ours or are based upon facts unlike the case at bar.

The defendant in error cites as an authority *Roberts v. Adams Co.*, 20 Neb., 409. The question involved in this action was not presented or discussed in that case. True the causes of action are alike. *Robert v. Adams County* was before this court twice, and from an examination of the first opinion found in 18 Neb., 471, it will be seen that in that case the claim was first presented to the county board and, after being rejected, an appeal was taken to the district court and tried there *de novo*.

In *Nance v. Falls City*, 16 Neb., 85, the action was brought to recover damages against the city—an unliquidated demand—and it was held that the suit could be maintained in the district court without having first presented the demand to the city council for adjustment. We do not question the correctness of that decision. It certainly has no application here.

This is not an action for damages. The amount of the demand sued for here is liquidated, fixed, and certain. When the county received these taxes there was an implied promise to repay them.

Judge Dillon in his work on Municipal Corporations, section 939, in speaking of actions like this, uses this language: "An important class of actions in form *ex-contractu* remains to be noticed. We refer to actions against municipal corporations to recover back money paid to them

for taxes. They are usually brought in assumpsit for money had and received," etc. To hold that a demand for taxes illegally collected by a county is a "claim" within the meaning of section 37, chapter 18, Compiled Statutes 1889, is certainly within the letter and spirit of the statute.

Section 131, ch. 77, Compiled Statutes 1889, provides that "When by mistake or wrongful act of the treasurer, or other officer, land has been sold on which no tax was due at the time, or whenever land is sold in consequence of error in describing such land in the tax receipt, the county is to hold the purchase[r] harmless *by paying him the amount of principal and interest,*" etc. Pay the purchaser when? After an action has been brought in the courts and judgment obtained? This would hardly save the purchaser harmless. This section unquestionably authorizes the county board to pay the purchaser without suit. If the board has that authority, then it follows that the claim must be presented to the board for allowance. By pursuing that method needless litigation would be avoided and unnecessary expense and costs would be saved both to the county and claimants. After a careful re-examination of the case, we are satisfied that our former decision was correct and it will be adhered to.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

28	814
46	61
28	814
58	819

ORIN M. SKINNER V. STATE.

[FILED FEBRUARY 19, 1890.]

1. **Rape: ASSAULT TO COMMIT: WHAT CONSTITUTES.** To warrant a conviction for an assault with intent to commit a rape, the evidence must show, beyond a reasonable doubt, that the accused not only intended to have sexual intercourse with the prosecutrix, but that he intended to use whatever force might be necessary to overcome her resistance and accomplish his object.
2. ———: ———: **EVIDENCE.** *Held*, That the verdict is not sustained by the evidence.

ERROR to the district court for Dundy county. Tried below before COCHRAN, J.

J. W. McClelland, and *May & McElroy*, for plaintiff in error.

William Leese, Attorney General, for the state.

NORVAL, J.

At the January term, 1889, of the district court for Dundy county an information was filed charging the plaintiff in error with making an assault upon one Rhoda A. Rogers, with the intent of committing upon her the crime of rape. He was convicted and sentenced to imprisonment in the penitentiary for two years. The defendant's motion for a new trial was overruled and an exception was entered on the record, and he now brings the cause to this court for review by proceedings in error.

Several errors are assigned, but one of which will be considered, and that is, that the verdict of the jury is not sustained by sufficient evidence.

It appears from the evidence that the prosecutrix, with her husband and family, resided in the rear rooms of a

store building situated in the village of Alstine; that the residence portion was separated from the storeroom by a partition, through which there was door or passage-way from the residence portion to the store, and which, just previous to the time the alleged assault was made, was open. It also appears that prior to the alleged occurrence the families of the prosecutrix and the defendant were on friendly terms; that the defendant had boarded in the prosecutrix's family at one time; had assisted her in the store, and that the two were frequently seen engaged in friendly conversation, with her head upon his breast. At the time of the alleged assault the store was kept by one J. P. Smith, and in which Mr. Smith was at the time. The husband, Mr. Rogers, had gone into the country on that day, which fact was known to the accused. The plaintiff in error, on the day in question, went into the store where Mr. Smith was, and passed on into the room occupied by the prosecutrix and her children. We quote the testimony of Mrs. Rogers, giving in detail what occurred in her room:

Q. Did you see the defendant on the 28th day of December, 1888?

A. I did.

Q. Where did you see him?

A. He came to my house.

Q. Where was you at the time he came to your house?

A. I was in the kitchen at work.

Q. About what time of day was this?

A. It was in the morning early he came first.

Q. What time—he came during the day again?

A. Yes, sir; he came there about four times between 8 o'clock that morning and 10.

Q. Was any one with him?

A. No, sir.

Q. Who was with you at these times on the 28th day of December that he came there?

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A. There weren't any one in the room with me but my children, but Mr. Smith was there in the store building.

Q. Was any one in the kitchen with you?

A. No, sir. * * *

Q. What did Mr. Skinner do and say to you when he came there first in the morning?

A. Well, he came that morning and spoke and said "Good morning" to me; then he sat down by the stove and he asked me when we were going away (we were talking about leaving); I said I didn't know when we were going, and then he began to inquire about a letter that we had got on the Monday before; and he asked me what it was and who wrote the letter; I told him I didn't know; and he wanted to know what was in the letter; I said I didn't know, and I would tell him what was in the letter; and he wanted to know what he was going to do about it; I said he wasn't going to do nothing; he says "Is he going to leave you?"

Q. Who did he refer to when he asked you what he was going to do about it?

A. He wanted to know what Mr. Rogers was going to do about it—what he was going to do about the letter; that was the matter.

Q. Go on and state what was said.

A. He says, "Is he going to leave you?" Said I, "No." He says, "Won't you go with me?" I says, "No, I would not."

Q. Mrs. Rogers, I wish you to narrate now what took place—what Mr. Skinner said to you when he first came in there in the morning of the 28th day of December?

A. When he asked me to go with him I said, "No, I would not; I have a man of my own; I told him to leave, and he went home, and he was not gone home but a few minutes until he came back in the storeroom. I was in there sewing, and he wanted to know where Will was—if he had come back. Says I, "No; he is not home yet."

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I says, "I want you to leave me." He made no reply but just stood there. Then he turned around and went out and got on his pony. I went in the kitchen to work again. He rode around to the kitchen door, I had the door open; he rode up to the door and he says to me, "When will Rogers want that table?" I knew what he wanted; I turned around and left him standing there, and he rode away and I didn't see him any more until dinner. * * *

Q. Now, when did you see the defendant again that day, on the 28th day of December?

A. I saw him go over the hills and he was gone about two hours and a half or three hours and then he came back at about half past three—just about that time—as near as I can tell; he rode up to Mr. Towles's store and tied his pony to the hitching post, and got off and came over to our place.

Q. Where was you at that time, when he came over the last time?

A. I was in the kitchen.

Q. Did he come to your door?

A. Yes, sir; he did.

Q. Tell what he said to you this time.

A. And he came into the store first and got some medicine, and then he came from the storeroom into the kitchen; as he came in he closed the door after him, and as soon as I could get to the door I opened the door, and I told him if he would please just leave the door open, and then he flew back and says, "Can't I talk to you with the kitchen door shut?"

Q. State briefly what was said there.

A. Then he came up to me and wanted to have intercourse with me, and I told him "No."

Q. Now, Mrs. Rogers, give the exact words that Mr. Skinner used to you at that time; just what he said.

A. Well, he says, "Won't you let me have it?" Said I, "No, I will not."

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Q. When he said this, where did he stand from you ; how far ?

A. He stood just in front of me, just as close as he could possibly get.

Q. Explain what he did to you.

A. When I told him "No," he took hold of my arms and forced me against the wall and said he must have it. I told him "No." Said I, "If you don't let loose of me I'll hollow." He says, "If you do, we'll both die right here together." He shoved his hand back where I seen a revolver sticking out of his pocket. He said, "Besides, if you tell it, he'll die too." He meant Mr. Rogers.

Q. Just go on and state what took place.

A. He says, "If he opens his head to me I'll drop him before he has a chance to do anything at all."

Q. Did he say anything about officers ?

A. Yes, sir.

Q. What did he say ?

A. He says, besides, "The officers can never take me." He says, "I have already killed three in my time and I am good for that many more." And when I told him I would hollow, he says, "If you do and they come out here I'll shoot them down."

Q. Go on and state what he then did and what you did.

A. *Well, when I told him I would hollow if he didn't let loose of me, he let loose of me then, and I had been ironing, and I picked up the clothes and ran out of there and went around the house and ran into the wareroom and staid there until I thought he would be gone; then I went into the store building; he had gone; I told Mr. Smith what had happened and he said, "Yes," he had heard it; and he had gone home then. He hadn't been home but just a few minutes, when he came carrying some things over that he had borrowed of us. He comes to the door and I didn't want to go to the door; he asked me to make up; I told him "No, I didn't want to," but I went to the door*

and he paid me for a jar that he had broken and worn out; then he went home again, and I was in the kitchen working and he came into the store again, and he came to my door and wanted me not to say anything about this; he says, "Let us make up friends and not make any trouble."

Q. Has the defendant made any attempts to assault you prior to the 28th day of December, 1888?

A. He did.

Q. When was that?

A. It was about four or six weeks before this.

Q. Now just state the circumstances of that assault, where he was and so on.

A. Well, it was in the same place. I was in the kitchen at work and he came in and said he wanted to talk to me; as we had always been friendly before; he talked a little while and then he made his proposals to me what he had come for.

Q. What did he say?

A. He said he wanted me to let him have "one"; that is just the words he used.

Q. What did you tell him?

A. I told him "No, I would not."

Q. What did he do?

A. I told him I would die right there before I would do such a thing as that. I said I would tell his wife; and he says, "Why you can't make her believe it if you do tell it to her." He says, "I can make her believe anything."

Q. Was there anything else said or done about the matter at that time?

A. Yes, sir; and he again asked me, and I told him "No," and he took hold of me at that time and tried to coax me to; I told him, "I would not, that I would die right there;" I told him to go; when he made the threats I told him if he didn't go I would call for help; there were some young men on the front steps talking; I told him I

would call these young men in if he didn't go ; he said if I did he would drop them right in the floor. * * *

Q. Now, then, the last time you have just spoken of, when did that occur ?

A. It was about the 15th of November.

Q. About what time in the day ?

A. It was in the morning, about 10 o'clock.

Cross-examination :

* * * * *

Q. What prevented him on the 15th day of November in succeeding when he asked you about it? What prevented him from overpowering you?

A. I told him if he didn't leave I was going to call these young men in.

Q. You think it was that that prevented him from succeeding?

A. Yes, sir ; I do.

Q. Did he attempt to disturb your clothes in any way ?

A. No more than taking hold of me.

The prosecutrix testified further on cross-examination that she was twenty-four years old at that time ; that Mr. Smith and two other men were in the storeroom at the time of the occurrence on December 28 ; that the defendant did not attempt to disturb her clothing ; that when she told the defendant if he did not let go of her she would halloo, he let loose ; that the prosecutrix had never told her husband or any one else of the first alleged assault until after December 28 ; that on a Sunday in December, after the first and prior to the last alleged assault, the prosecutrix and her husband went home with the defendant and his wife, took dinner, and spent part of the day with them, and that the defendant stopped over night at the prosecutrix's on the 27th day of November, a few days after the first alleged assault.

J. F. Smith testified that the defendant went into the room of the prosecutrix through the store on December

28; that he heard some noise and some talking, which was not very loud.

We have given substantially all the testimony contained in the bill of exceptions in regard to the assault. Is it sufficient to support the verdict? We think not.

In the case of *Garrison v. People*, 6 Neb., 274, it was held that "To constitute an assault with intent to commit a rape there must have been an intent to commit a rape, and that intent must have been manifested by an assault for that purpose upon the person intended to be ravished. Both of these ingredients are necessary to constitute the offense." It was undoubtedly the defendant's desire to have sexual intercourse with the prosecutrix. The evidence fails to show that he intended to compel her to submit to his desires by force, but the entire circumstances established that he expected to accomplish his purpose by procuring her consent, and failing in that he desisted. The place and time of day when the act was committed, the previous acts of the parties, the fact that her clothes were not disturbed, that there was no indication of violence on her person, and that the defendant ceased urging his solicitations when the prosecutrix threatened to make an outcry, indicate that the defendant did not intend to commit a rape. He must have intended to use whatever force was necessary to overcome her resistance and compel her to submit to his passions, to make out the crime of an assault with intent to commit rape.

The evidence fails to sustain the verdict.

The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THE other judges concur.

LEWIS LEY V. HANS H. MILLER.

[FILED FEBRUARY 25, 1890.]

Parties: DAMAGES: CONTRACT TO PAY ANOTHER'S DEBT. H. H. M. being holden for the debts of the late firm of M. & M., for which he held a chattel mortgage upon the property of C. F. M., L. L. entered into an agreement with H. H. M. that, on consideration that he would release the said chattel mortgage, he would assume and pay off the indebtedness of said firm, which said indebtedness included the debt of one C. R. The chattel mortgage having been released, L. L. failed to pay the debt of C. R. In an action brought by H. H. M. against L. L., on said agreement, *held*, that the contract having been made with H. H. M. for the benefit of C. R., the action could be maintained in the name of H. H. M., and that the measure of damages was the amount of said debt of C. R. remaining unpaid.

ERROR to the district court for Madison county. Tried below before POWERS, J.

H. C. Brome, for plaintiff in error.

D. A. Holmes, *contra*.

COBB, CH. J.

The plaintiff below brought his action in the district court alleging that in December, 1885, Charles F. Mueller and himself were doing business in Norfolk, in Madison county, under the partnership firm of Mueller & Miller, which had then terminated, the partner continuing to carry on the business and assuming all the liabilities of the late partnership; that for the purpose of securing the plaintiff against such partnership liabilities Mueller executed a chattel mortgage covering certain horses, wagon, cattle, and other property sufficient to secure the plaintiff; that on January 6, 1886, Mueller having failed to comply with the conditions of the mortgage, and pay certain firm liabilities,

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the plaintiff took possession of the property in order to sell the same and satisfy the indebtedness; that on the same day the defendant, to procure the release of the property, entered into the following stipulation:

"Agreement made and entered into by and between Hans H. Miller and Lewis Ley, witnesseth: That whereas said first party is holden for the debts of the firm of Mueller & Miller, lately doing business in Norfolk, Neb., and whereas said party now has a chattel mortgage against Charles F. Mueller to secure him, the said first party, for the payment of said indebtedness: Now, therefore, said first party, in consideration of one dollar, and upon further consideration that the said secured party will assume and pay off the indebtedness of said firm:

"To the Chicago Lumber Co., of about.....	\$20 00
"To C. Shenberg & Co., of about.....	57 00
"To Prescottt, of Sioux City, of about.....	21 00
"To C. Rudat, of about.....	150 00

"It being understood that the claims of the above parties are to be paid in full by said second party, hereby agrees to release a certain chattel mortgage given to him by said Charles F. Mueller and to deliver up possession to him of certain personal property taken thereunder.

"Dated Jan. 6th, 1886.

LEWIS LEY."

That by reason of the agreement the plaintiff released the mortgage and restored the property to the defendant; that at that time among other liabilities of the late firm was a balance of \$125 on two promissory notes in favor of Charles Rudat, which the defendant had neglected, and still refuses, to pay; that on April 16, 1886, Rudat recovered judgment against Miller for \$166.43 on said notes, before A. Sattler, Esq., a justice of the peace of said county, which is wholly unsatisfied, and which the defendant refused to pay—praying judgment on these premises against the defendant for \$199.

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The defendant answered, admitting the stipulation set forth, but denying that the plaintiff had a beneficial interest therein, and averring that he was not the real party in interest in this suit, but that Rudat was the beneficiary of said agreement; that the plaintiff now is, and since the execution of the agreement has at all times been, wholly insolvent; and further setting up a payment to Rudat of \$75 on his claim, and a tender of the balance due him, and of his refusal to receive it.

Upon these issues there was a trial to the court without a jury, and judgment for the plaintiff for \$186.20.

The defendant's motion for a new trial was overruled, and exceptions being taken, he filed his petition in error in this court.

The first question presented in the brief of counsel arises upon the proposition that there being no reply in the pleadings, the matter set up in the answer must be taken as true.

There was a suggestion of a diminution of the record filed in this court by defendant in error, and a motion for leave to supply the record of the filing of a reply. This motion was supported by an affidavit of counsel for defendant in error and resisted by a counter-affidavit of counsel for plaintiff in error. It does not appear by the court records that any ruling was made on this motion; but there appears in the record a certificate from the district judge that upon the trial of the cause in the district court the new matter set up in the answer was treated as denied by a reply. It is quite doubtful what, if any, weight can be given to this certificate. It is not an amendment of the record proper, as that could only be made by the clerk of the district court; nor can it be treated as a supplement to the bill of exceptions. But upon an examination it is doubted that any new matter was set up requiring a reply. The allegation that the plaintiff is not, or that Charles Dudat is the real party plaintiff in interest, is not a question of fact but one of law, arising upon the petition and

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answer. Although the allegation that the plaintiff was insolvent seeks to raise a question of fact, such fact was not relevant. The allegations of payment and tender to Charles Dudat were not relevant, unless considered in connection with an application on the part of the defendant, or the said Dudat, that he be made a party in the case either by intervention or otherwise. It is believed that the rights of the parties can be ascertained from the record as it now stands, and a fair measure of justice awarded them without the application of technical rules.

But, in the first place, I will say in reply to the position of plaintiff in error, as taken in the brief, as well as in his answer in the court below, that the plaintiff cannot maintain his action because he is not the real party in interest. It is true the statute provides, in section 29 of the Code, that "every action must be prosecuted in the name of the real party in interest," but said section also contains the following, "except as otherwise provided in section 32." Section 32 provides as follows: "A person with whom, or in whose name a contract is made for the benefit of another, * * * may bring an action without joining with him the person for whose benefit it is prosecuted." This provision of the Code is believed to be entirely applicable to and conclusive of the point raised. Moreover, such is believed to have been the law before the adoption of the Code, and it is so held in many states without reference to special statutory provisions. (See cases cited by counsel for defendant in error; also, *Carter v. Adamson*, 21 Ark., 287, and cases cited in that opinion.)

The case of *Wilson v. Stilwell*, 9 Oh. St., 467, is quite in point. In that case, Stilwell and one Tooker were carrying on a partnership business, and were owing certain debts; Stilwell retired from the firm and Tooker, with Wilson as his surety, entered into a bond with him conditioned for the faithful payment of the debts of the firm. Tooker failed to pay all the debts of the firm, but certain of them

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were left unpaid, and for which Stilwell sued Tooker and Wilson on the bond. He also made the creditors, whose claims remained unpaid, defendants. Tooker made default, but Wilson answered, and judgment being rendered against him in the superior court of Cincinnati, he took error to the supreme court. In the opinion the court held, that the phrase "settle up and liquidate" in the condition of the bond, taken in connection with the accompanying recital, is equivalent to the word *pay*, and imposes the obligation to *pay* all the debts of the late firm of J. M. Tooker & Co., and is readily distinguishable from an obligation to indemnify against a liability. That while it is settled "that if there be a contract to indemnify, simply and nothing more, then damage must be shown before the party indemnified is entitled to recover; but if there be an affirmative contract to do a certain act, or to pay a certain sum or sums of money, then it is no defense to say that the plaintiff has not been damaged; and that the measure of damages, in such case, is the amount agreed to be paid," etc. In that case the unpaid creditors of J. M. Tooker & Co., having been made parties, and having answered, the penalty of the bond was directed to be paid directly to them, to the extent of their claims. And in this case, had Rudat been made a party, or had he intervened, the recovery would have been by him directly, and doubtless upon an application in the district court, with a showing that he is still the owner and holder of the claim against Miller, the judgment will be directed to be paid to him.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

VACLAV BRUSA ET AL. V. SANDWICH MANUFACTURING
COMPANY.

[FILED FEBRUARY 25, 1890.]

Continuance: Agreement: Dismissal: Mistake. On a contingent and alternative agreement between attorneys of record to an action pending in a county court, for the continuance of the cause for trial to a day certain, by which the plaintiffs' attorneys were misled as to the consent and fact of postponement of the trial, which was called in their absence and dismissed, and a motion to reinstate the case upon affidavits of the facts, and of merits, overruled, and which was subsequently reversed on error in the district court, *held*, that the evidence presented to the county court was sufficient to sustain the last judgment.

ERROR to the district court for Saline county. Tried below before MORRIS, J.

Abbott & Abbott, for plaintiffs in error:

A party may not willfully abandon his case, and, after dismissal in consequence thereof, have it reinstated on motion. Defendant in error's attorneys had ample notice that the trial would be pushed, but refused to go near, and are thus guilty of laches. (*Treutler v. Halligan*, 86 Ill., 39; *Swits v. Carver*, 20 Id., 578; *Nispel v. Wolff*, 74 Id., 303.) Negligence of the attorney within the scope of his powers is that of the client. (*Stern v. Strausberger*, 71 Ill., 413; *Yates v. Monroe*, 13 Id., 212.) In *Volland v. Wilcox*, 17 Neb., 46, defendant was not guilty of laches.

Dawes & Foss, *contra*:

The affidavits show that there was a full understanding in regard to the trial, and as the judgment was rendered by mistake it was properly reopened. (*Smith v. Pinney*, 2 Neb., 139; *McCann v. McLennan*, 3 Id., 25; *Wise v. Frey*, 9 Id., 220; *Hansen v. Bergquist*, Id., 277; *Volland v. Wilcox*, 17 Id., 46; Code, 602; Freeman, Judgments, 100.)

COBB, CH. J.

This proceeding is brought from the district court of Saline county on error.

In August, 1888, the Sandwich Manufacturing Company brought suit against the plaintiffs in error in the county court on an alleged contract of sale of a harvester. The defendants answered, and the cause was continued, by agreement, from month to month, to the February term, 1889. On Monday, February 6, the first day of the term, the defendants appeared for trial. The court held that, it being the first day of the term, it could not enter upon the trial in the absence of either party, but set the cause for hearing on the next day, February 7, at 10 o'clock A. M. In the meantime, as appears from the bill of exceptions, conferences were had by the attorneys of both parties in an attempt to agree upon a continuance. The plaintiffs' attorneys not appearing on the day set for trial, on motion of defendant's attorneys the cause was dismissed for want of prosecution. On February 9, following, the plaintiffs' attorneys moved to vacate the order of dismissal and set the case for trial, for the reason that the order was procured and rendered through mistake and misunderstanding of the attorneys and from unavoidable casualty, as shown by affidavits presented and filed. Notice of this motion having been duly given to the defendants' attorneys, by agreement the hearing was continued to February 18, following, and was then heard and considered on the affidavits of James W. Dawes and Fayette I. Foss, attorneys for plaintiff, in support of the motion, and of E. S. Abbott, attorney for defendants, and Hugh McCarger, *contra*, upon which the motion was overruled, and the proceedings taken by stipulation to the district court on error.

On the hearing in the district court, March 22, 1889, it was found there was error in the court below in refusing to vacate the order of dismissal, and the judgment therein

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was set aside and reversed and the cause was remanded for further proceedings, on the plaintiff's paying all costs of the term at which the judgment of dismissal was entered; to which the defendants excepted on the record, and filed their petition in error in this court.

From the affidavit of F. I. Foss, Esq., it appears that, although the junior of his law firm, he had the full charge of the conduct and prosecution of the cause in the county court, which was for trial Monday, February 4, 1889; that on the preceding Saturday, "knowing that he had to go away, and be absent, on Monday, in the western part of the state," he went to the office of Abbott & Abbott, defendants' attorneys, and requested a continuance until the first Monday of March, which they agreed to, and said they would see their clients and notify them; that in the evening E. S. Abbott informed affiant that defendants did not consent to put off the trial, and that it would have to be tried on Monday; that affiant notified E. S. Abbott that it was absolutely necessary for him to go west, to be gone till the last of the following week, and made him the proposition that, in consideration of his agreement to the adjournment, he could have it set for trial either Saturday, February 9, or Monday, February 11, as suited him best; that if he desired, he could use the stenographer and typewriter employed in affiant's office to take the testimony of his witnesses, and he then agreed to bring the witnesses, whom he alleged were going away, into affiant's office for that purpose on Monday following, and that such testimony should be admitted in the defense without objection, and upon that understanding and agreement, that the case was to be continued as stated, and the testimony to be taken as stated, affiant notified E. S. Abbott that he should leave the next day for the west, and did leave, and returned on Thursday, February 7, and found that defendants' attorneys had gone to Wilber and had the case dismissed and judgment rendered against his client for costs.

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The affidavit of James W. Dawes, Esq., in all material matters is corroborative of that of his law partner Foss, and further sets up that the sole reason why *he* was not present in court and prepared for trial was his dependence on the agreement stated for the adjournment of the trial.

On behalf of defendants there was considered the affidavit of E. S. Abbott, Esq., attorney for defendants, who had charge of the defense, stating that Mr. Foss came to his office and asked that the cause be continued, and was told in reply that affiant thought that the witnesses for the defense were about to leave the country and that the suit could not, for that reason, be continued, but that he would find defendants and agree to a continuance, if possible, and would let him know; to which Foss replied "Then it will be all right if I do not hear from you?" and affiant answered "Yes." Affiant found defendants, who refused to consent because witnesses were then prepared to go away and were waiting for that trial the next Monday. Affiant sent a note to Foss stating the reasons why the case could not be continued. Soon after he received a note from Foss stating in substance that it must be done, as it was of importance to him that it should be so; to which affiant replied as before, that the suit must go on, and supposed that the end of the matter. About sunset affiant met Foss, who insisted that the trial must, in some way, be continued, and on affiant's going to his office to arrange it. Affiant went and stated the reasons again. Then it was urged that defendants' witnesses should come to Dawes & Foss' office and their testimony taken as stated in their affidavits. To this affiant objected, but finally consented if the witnesses could be had, and again found defendants and insisted on that course and advised them to get the witnesses to come around; to which they replied that they could not say that night whether, or not, they could be had, but would let affiant know the next (Sunday) morning, as it was then dark. On the next forenoon they said they could not find

the witnesses the night before; that they were twelve miles distant, and would meet them in Wilber the next Monday, for the trial, and go thence on their journey. Affiant had met Hugh MacCarger (the agent of plaintiff) in the barber shop on Saturday night, and told him the question of continuance was to be determined the next morning, and at about noon on Sunday found MacCarger and told him the situation of affairs, and that the suit must go on. On Monday, between 8 and 9 A. M., MacCarger stopped at affiant's office, on his way to Dawes & Foss' office, and said he was going to take Gov. Dawes down to Wilber, and that affiant could ride with them, to which affiant assented. MacCarger shortly came back and reported that Dawes said the suit was continued and positively refused to take any action in the matter.

Hugh MacCarger's affidavit corroborates that of Abbott, and states that after being informed at noon, on Sunday, that the trial must go on, he met Foss between 2 and 3 P. M. at the outgoing train and informed him what Abbott had said about the case; that Foss sent word by his clerk to his partner, Gov. Dawes, that he must attend to the case. Affiant further informed Mr. Dawes on Monday that the trial must go on.

Upon this evidence the county court denied the motion to vacate the order of dismissal, and to set the cause for trial; and upon this testimony the district court reversed the judgment of the court below, on error, and remanded the cause to that court for trial.

There is no great conflict in the evidence as to the agreement and misunderstanding incident to the preparation of the cause for trial by the attorneys of record. And yet we were all of the opinion, in consultation, that there was sufficient evidence that the member of the firm of plaintiff's attorneys who had been charged with the sole management of the plaintiffs' case had relied upon the indefinite promises of the defendant's attorney that the cause should be

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continued on agreement, and had reason to believe that such agreement would be carried out until the moment of his departure on the outgoing train of Sunday afternoon; and that it was through a misunderstanding between him and his partner (for which the defendants' attorneys were in no sense responsible) that there was no appearance on the part of plaintiff to defend against the motion for dismissal in the county court, on a meritorious cause of action, that the plaintiff was deprived of a trial; and it appeared that there was sufficient in the evidence as to the circumstances misleading the attorneys of the parties to sustain the judgment and order of the district court in directing a new trial.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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WILLIAM C. BRAITHWAITE V. STATE.

[FILED FEBRUARY 25, 1890.]

1. **LARCENY: EVIDENCE.** Where property is stolen from a corporation it is unnecessary on the trial of the thief to introduce the articles of association or charter of the corporation. It is sufficient to prove that such a corporation in fact was in existence and was possessed of the property stolen.
2. ———: **AMENDMENT OF INFORMATION** held to have been unnecessary, and the procedure thereunder worked no prejudice to the accused.

ERROR to the district court for Boone county. Tried below before HARRISON, J.

Miller & Harris, for plaintiff in error:

The proceedings under the first information were a legal bar to trial under the amended information. (Const., art. I, sec. 12; Bishop, Criminal Law [5th Ed.], 1016; Wells, Res Adjudicata, p. 318; *Whitmore v. State*, 43 Ark., 274; *State v. Ward*, 48 Id., 36; *People v. Webb*, 38 Cal., 479; *Weaver v. State*, 4 Crim. Law Mag., 27; *State v. Schuchardt*, 18 Neb., 455.) The first information alleged that the money charged to have been stolen was the property of the Albion State Bank, and this was a sufficient allegation of ownership to sustain a conviction. (*Sasser v. State*, 13 Ohio, 453; *Reed v. State*, 15 Id., 217; *Burke v. State*, 34 Ohio St., 79; *McCarney v. People*, 2 Crim. Law Mag., 578.) The preliminary matters of record were thus fully complied with under the first information, and the accused "put in jeopardy" thereby. He could not, therefore, have been properly tried under the second information, the filing of which was a dismissal of the first, and in the nature of *nolle prosequi*.

William Leese, Attorney General, and J. A. Price, for the state:

The jury was not discharged in the filing of the amended information, and there is no ground for the claim that the accused was twice put in jeopardy. The amendment was not improperly allowed, and the rights of the accused were not prejudiced thereby. (*Burk v. State*, 34 Ohio St., 79; *People v. Hamilton*, 42 W. W. Rep., 1131; *Keattor v. People*, 32 Mich., 484; *State v. Snow*, 30 La. Ann., 401; *State v. Stearns*, 28 Kan., 154; *State v. Merchant*, 38 Ia., 375; 1 Bishop, Crim. Pro. [3d Ed.], section 714; 3 Russell on Crimes, 323, 332, 333.)

MAXWELL, J.

In January, 1889, an information was filed against the plaintiff in error in the district court of Boone county in

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which he was charged with the larceny of \$1,000, "the property of the Albion State Bank, of Albion, Boone county, Nebraska." To this information he pleaded "Not guilty." On the trial of the cause, after the jury had been impaneled and sworn, the prosecuting attorney, upon leave granted, amended the information as follows, after the words "Albion State Bank," by adding "a corporation organized and doing business under the laws of the state of Nebraska." The court thereupon required the defendant below (plaintiff in error) to plead anew to the amended information, which he did by again pleading "Not guilty," and the jury previously impaneled was again sworn to try the issue joined. The plaintiff in error pleaded these facts in bar of the further prosecution of the case. The plea was overruled, to which exceptions were duly taken. The jury returned a verdict of guilty as charged in the information and the plaintiff in error was sentenced to imprisonment in the penitentiary for three years.

The evidence is not in the record, and the only question before the court is the ruling of the district court in permitting the amendment of the information after the jury was impaneled and sworn. It is claimed that this operated as a discharge of the accused, particularly as the court had caused the jury to be sworn again, thereby treating the case as if the jury had been discharged. Section 412 of the Criminal Code provides that "No indictment shall be deemed invalid, nor shall the trial, judgment, or other proceedings be stayed, arrested, or in any manner affected: First, by the omission of the words 'with force and arms,' or any words of similar import; or, second, by omitting to charge any offense to have been contrary to a statute or statutes; or, third, for the omission of the words 'as appears by the record'; nor for omitting to state the time at which the offense was committed, in any case where time is not of the essence of the offense; nor for stating the time imperfectly; nor for want of a statement of the value

or price of any matter or thing; or the amount of damages, or injury, in any case where the value, or price, or the amount of damages, or injury is not of the essence of the offense; nor for the want of an allegation of the time or place of any material fact, when the time and place have once been stated in the indictment; nor that dates and numbers are represented by figures; nor for an omission to allege that the grand jurors were impaneled, sworn, or charged; nor for any surplusage or repugnant allegation when there is sufficient matter alleged to indicate the crime or person charged; nor for want of the averment of any matter not necessary to be proved; nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

This section of our statute was copied from the Criminal Code of Ohio, and its proper construction was before the supreme court of that state in *Burke v. State*, 34 O. S., 79, and it was held that the corporate character of the company was sufficiently shown by proof that it was, at the time of the commission of the offense charged, a corporation *de facto*.

In that case the accused was charged with burglary by breaking "into a certain railroad car of the Pittsburg, Cincinnati & St. Louis Railroad Co." on the night of November 23, 1875. There was no allegation in the indictment that the company was a corporation, but evidence was offered and received tending to show its corporate character. The court in that case instructed the jury that "It is not necessary for the state to prove the articles of association or charter of the Pittsburg, Cincinnati & St. Louis Railway Co., but it is sufficient to prove by reputation that there was, at the time when the crime is alleged to have been committed, a corporation known by that name, operating such road, and carrying goods, stock, and passengers for hire in its cars running along said company's road. A *de facto* existence of the corporation is only nec-

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essary to be shown." This, we think, is a correct statement of the law.

The particular mode in which a corporation was organized, whether as a corporation of this state or not, cannot be material in any case where the validity of its organization is not involved. If it is in fact a corporation, and as such was lawfully in possession of certain property which has been stolen from it, it is sufficient to allege in the indictment or information its corporate character, and on the trial prove that it is a corporation *de facto*; in other words, it is sufficient to prove that it is a person in fact, without proving how it came into existence—the material inquiry being, Was the property of such person stolen from it by the one accused of the larceny?

The practice of amending an information on the trial is not to be commended. It is a power liable to abuse, and if it is apparent that the amendment may prejudice the accused, it should not be permitted. To what extent amendments may be sustained is not now before the court, but no amendment was necessary in the case at bar, and the essential facts stated in the amended information, that it was a *de facto* corporation, could have been proved without amending the same. The amendment, therefore, caused no prejudice to the plaintiff in error.

The jury were not discharged before verdict, but the court, out of a superabundance of caution, caused them to be sworn a second time. This was unnecessary.

There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

WM. D. DAVIS V. COMMISSIONERS OF BOONE COUNTY.

28	837
62	253

[FILED FEBRUARY 25, 1890.]

1. **Roads: ORDER LOCATING: PROCEEDINGS TO REVERSE.** Where objections to the location of a public road were filed by a land-owner with the board of county commissioners and by such board overruled, and the case taken on error to the district court and from there, on the affirmance of the order, to the supreme court, only the objections made before the commissioners will be considered; the question being whether or not they erred.
2. ———: ———: **WAIVER OF OBJECTIONS.** Where a land-owner files a claim for damages caused by the location of a public road over his land, he thereby waives all objections on the ground of irregularities in locating the road.

ERROR to the district court for Boone county. Tried below before TIFFANY, J.

I. L. Albert, for plaintiff in error:

The record must show affirmatively that all the requirements of the statute have been complied with. (*People v. Scio*, 3 Mich., 121; *Gray v. Com'rs*, 40 Id., 165; *Williams v. Holmes*, 2 Wis., 129*; *Com'rs v. Muhlenbacher*, 18 Kan., 132; *Com'rs v. Outtler*, 7 Ind., 6; *McCabe v. Com'rs*, 46 Ind., 382.) The county board is a tribunal of limited jurisdiction, and all facts necessary to authorize its action must appear of record. (*Robinson v. Mathwick*, 5 Neb., 252; *Howard v. Dakota County*, 25 Id., 229.)

J. A. Price, contra:

Objections to the petition must be specific and not general. (*Osborn v. Sutton*, 9 N. E. Rep., 410; *Updegraff v. Palmer*, 107 Ind., 181.) As no objections to the qualifications of petitioners were made when the claims for dam-

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ages were filed, the question cannot be raised now. (Comp. Stats. 1887, ch. 78, secs. 16, 19, 22; *In re Road in Washington Tp.*, 1 Atl. Rep., 657; *Washington Ice Co. v. Lay*, 2 N. E. Rep., 222; *Robinson v. Rippey*, 12 Id., 141; *Humboldt Co. v. Dinsmore*, 17 Pac. Rep., 710; *Breitweiser v. Fuhrman*, 88 Ind., 28; *Forsythe v. Kreuter*, 100 Id., 27; *Road in Moore Tp.*, 17 Pa. St., 116.) The board determined the sufficiency of the petition by exercising its powers unchallenged, and it had a right to thus determine its jurisdiction. (*Damrell v. San Joaquin Co.*, 40 Cal., 158; *In re Grove St.*, 61 Cal., 453; *Tehama Co. v. Bryan*, 68 Id., 57; *Butte Co. v. Boydston*, 11 Pac. Rep., 781; *Osborn v. Sutton*, 9 N. E. Rep., 410.)

MAXWELL, J.

This is a proceeding in error to reverse the judgment of the district court of Boone county, affirming an order for the establishment of certain public roads in that county.

It appears from the record that in November, 1888, and March, 1889, petitions for certain public roads in that county were presented to the defendants as follows:

"To the Honorable Board of County Commissioners of said County:

"We, the undersigned, landholders, residents of said county, respectfully petition for the appointment of a commissioner to examine and establish a county road, commencing at the southwest corner of section 9, township 19, north, of range 8 west, in Boone county, Nebraska, running thence north along section line as far as practicable to the southwest corner of section 28, township 20, range 8 west; thence east 235 rods; thence south 80 rods or thereabouts; thence in a southeasterly direction along the ridge to the west section line of 34, township 20, range 8 west; thence south along section line to southeast corner of sec-

tion 9, town 19 north, range 8 west, and terminating at said last mentioned point.

"Dated October 22, 1888.

"OSBORNE PATTERSON.	L. E. AMES.
"JOHN T. ROBBINS.	W. S. BROWN.
"AUGUST RIELS.	WILHELM RIELS.
"NICK KEBER.	SAM'L SILLICK.
"L. C. CLOSE.	JOHN LANGHBEHN.
"J. G. FOUTS.	NIELS J. THOMSON.
"LAWSON BRIAN.	TIMOTHY SLOAN.
"J. E. DOVE.	CORNELIUS NELSON.
"ROBERT NEBLOCK.	JAMES O'KEEFE.
"CLARK WILBUR.	SAMUEL ARTHUR.
"ROBERT LOCKHART.	NELSON SIMMONS.
"JACOB KEBER.	ANDREW PATTERSON.
"JOHN SCHEEL.	GEORGE RIED.
"THOMAS ARMSTRONG.	

"STATE OF NEBRASKA, } ss.
BOONE COUNTY,

"On this 5th day of March, A. D. 1889, before me, Wm. Weitzel, county clerk in and for Boone county, personally appeared Osborne Patterson, one of the petitioners within mentioned, who, upon being duly sworn, deposeth and says that the parties whose names are subscribed to the annexed petition are residents on lands within five miles of the line of said road as petitioned for at the date of petition.

"OSBORNE PATTERSON.

"Subscribed and sworn to before me the date above written.
WM. WEITZEL, *County Clerk.*"

A commissioner was thereupon duly appointed, who examined the route proposed and reported in favor of the road.

There were strong remonstrances against the location of the road, and the plaintiff in error personally filed objections as follows:

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"To the Honorable Board of County Commissioners of Boone County:

"The undersigned elector, residing on the S. W. quarter of sec. 9, town 19, range 8, objects to the establishment of a county road petitioned for by Osborne Patterson and others, commencing at the S. W. corner of sec. 9, running through various courses and terminating at the S. E. corner of sec. 9, for the following reasons, to-wit:

"First—That the petition is not in accordance with sec. 4, chap. 78.

"Second—That the commissioner did not take in consideration my private interest in the S. W. $\frac{1}{4}$ of sec. 9, whereas he located the above road so as to cut me off running water on the above parcel of land so as to save the public from building a bridge and give me access to the water, which he should have done according to section 8, chapter 78.

"Third—The commissioner has not, according to section 12, chapter 78, impartially located the above road, for he called to his aid and assistance the petitioner Osborne Patterson.

WM. D. DAVIS."

He also made claims for damages, as follows:

"To the Board of County Commissioners of Boone County, Nebraska:

"I, Wm. D. Davis, hereby claim from Boone county the sum of \$50 as damages to my property by reason of the location of the county road No. — through the following described lands, to-wit: N. W. $\frac{1}{4}$ of section 9, town 19 north, range 8 west, 2 acres.

"WM. D. DAVIS, Claimant.

"Filed January 30, 1889. Amount claimed, \$50. Allowed by appraisers, —. Allowed by board, \$5.

"CLAIM FOR DAMAGES.

"I, Wm. D. Davis, hereby claim from Boone county the sum of \$50 as damages to my property by reason of the

Davis v. Boone County.

location of county road No. — through the following described lands, to-wit: S. E. $\frac{1}{4}$ of section 9, town 19 north, range 8 west, 2 acres. WM. D. DAVIS, *Claimant*.

"Filed January 30, 1889. Amount claimed, \$50. Allowed by appraisers, ———. Allowed by board, \$5."

Also the following:

"To the Board of County Commissioners of Boone County, Nebraska:

"I, Wm. D. Davis, hereby claim from Boone county the sum of \$800 as damages to my property by reason of the location of county road No. — through the following described lands, to-wit: S. W. $\frac{1}{4}$ of sec. 9, T. 19 N., R. 8 west, 2 acres. WM. D. DAVIS, *Claimant*.

"Filed January 30, 1889. Amount claimed, \$800. Allowed by appraisers, \$30. Allowed by the board, \$30.

"To the Board of County Commissioners of Boone County, Nebraska:

"I, Wm. D. Davis, hereby claim from Boone county the sum of \$50 as damages by reason of the location of county road No. — through the following described lands, to-wit: N. E. $\frac{1}{4}$ of sec. 9, T. 19 N., R. 8 west, 2 acres. WM. D. DAVIS, *Claimant*.

"Filed January 30, 1889. Amount claimed, \$50. Allowed by appraisers, ———. Allowed by the board, \$5."

Also a further claim for damages:

"To the Board of County Commissioners of Boone County, Nebraska:

"I, Wm. D. Davis, hereby claim from Boone county the sum of \$50 as damages to my property by reason of the location of county road No. — through the following described lands, to-wit: S. E. $\frac{1}{4}$ of sec. 5, T. 19 N., R. 8 west, 2 acres. WM. D. DAVIS, *Claimant*.

"Filed January 30, 1889. Amount claimed, \$50. Amount allowed by appraisers, ———. Allowed by board, \$5."

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"To the Board of County Commissioners of Boone County, Nebraska:

"I, Wm. D. Davis, hereby claim from Boone county the sum of \$25 as damages to my property by reason of the location of county road No. — through the following described lands, to-wit: S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of sec. 5, T. 19 N., R. 8 west, 1 acre. Wm. D. DAVIS, Claimant.

"Filed January 30 1889. Amount claimed, \$25. Allowed by appraisers, ——. Allowed by board, \$5."

Objections were overruled by the defendants and the roads in question located.

The district court affirmed the order of the defendants.

As this proceeding is, in effect, a review of the official acts of the defendants in locating the road in controversy, only the objections made before them will be considered.

First—That the petition is not in accordance with section 4, chap. 78, and is as follows:

"Any person desiring the establishment, vacation, alteration of a public road, shall file in the clerk's office of the proper county a petition signed by at least ten electors residing within five miles of the road proposed to be established or vacated, in substance as follows:

"*"To the Board of ——— County:*

"The undersigned ask that a public road, commencing at ——— and running thence ——— and terminating at ———, be established, vacated, or altered (as the case may be).'"

The objection was entirely too general in its terms. It should have pointed out wherein the petition failed to comply with the provisions of the statute so that the attention of the defendants could have been called to the defect. No doubt more than ten of the petitioners were electors residing within the required distance and the petition could have been so amended if necessary. This objection, therefore, was properly overruled.

Small v. Small.

The second and third objections are not supported by any evidence in the record, and, therefore, are unavailing. In addition to this the filing by the plaintiff in error of a claim for damages waives all objections to the location of the roads. He, in effect, says to the defendants, "You have taken my land for a public road and I demand damages therefor." These he is entitled to recover, but the filing of the claim is a waiver of irregularities in locating the roads.

There is no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

CASSIE A. SMALL V. JOSEPH SMALL.

[FILED FEBRUARY 25, 1890.]

1. **DIVORCE: ADULTERY.** On the evidence contained in the record, *held*, that the charge of adultery against the defendant was fully proved, while a like charge against the plaintiff was not sustained.
2. **ALIMONY: GROUNDS.** In allowing alimony the court will consider the ability of the husband, the estate, if any, of the wife, and the situation of the parties, and will render such a decree as under the circumstances will be just and equitable.
3. ———. Decree for \$20 per month alimony in addition to the homestead, *held*, to be excessive.
4. **Custody of child was,** on the proof, properly given to the mother.

APPEAL from the district court for Douglas county.
Heard below before DOANE, J.

Charles Offutt, for appellant, cited: *Barton v. Thompson*, 46 Ia., 30; *Berckmans v. Berckmans*, 17 N. J. Eq.,

28	843
43	594

Small v. Small.

453; *Freeman v. Freeman*, 31 Wis., 235; 37 Id., 38; 2 Bishop, Mar. & Div. [6th Ed.], 6, 642; 2 Greenleaf, Ev. [14th Ed.], sec. 51; *Lady Kirkwall's Case*, 2 Hagg. Consistory [Eng.], 277; *Ross v. Ross*, 1 P. & D. [Eng.], 734; *Thomas v. Thomas*, 2 Swab. & Tr. [Eng.], 113, 118; *Gipps v. Gipps*, 3 Id., 116; *Hedden v. Hedden*, 6 C. E. Green [N. J.], 61; *Rogers v. Rogers*, 122 Mass., 423; *Pitts v. Pitts*, 52 N. Y., 593; *Dance v. Dance*, 3 Eng. Eccl., 341; *Burns v. Burns*, 60 Ind., 259; *Betz v. Betz*, 2 Rob. [N. Y.], 694; *Mortimer v. Mortimer*, 4 Eng. Eccl., 543; *Marble v. Marble*, 36 Mich., 387; *Dailey v. Dailey*, Wright [O.], 514; McKenzie, Crim. Law, 177; *Burgess v. Burgess*, 4 Eng. Eccl., 527; *Grant v. Grant*, 7 Id., 3; *Shafer v. Shafer*, 10 Neb., 472; *Smith v. Smith*, 19 Id., 715; Daniel, Ch. Pr. [4th Ed.], p. 1072; *Tappen v. Evans*, 11 N. H., 311; *Andrews v. Pritchett*, 66 N. Car., 387; *Townsend v. Graves*, 3 Paige [N. Y.], 453; *Pomeroy v. Winship*, 12 Mass., 514; *Lapreese v. Falls*, 7 Ind., 692; *Fisher v. Porch*, 2 Stock. [N. J.], 243; *Hooe v. Marquess*, 4 Call [Va.], 416; *Marshall v. Thompson*, 2 Munf. [Va.], 412; *Dale v. Roosevelt*, 8 Cow. [N. Y.], 333; *Lea v. Beatty*, 8 Dana [Ky.], 207; *Marston v. Brackett*, 9 N. H., 336; *Hoitt v. Burleigh*, 18 Id., 389; *Oades v. Oades*, 6 Neb., 306.

A. C. Wakeley, contra, cited: 2 Greenleaf, Ev., sec. 54, and cases.

MAXWELL, J.

The plaintiff brought an action for a divorce in the district court of Douglas county and on the trial of the cause a decree was rendered as follows:

"That the said plaintiff and the said defendant were married on July 29, 1875; that the said plaintiff has since said marriage conducted herself towards the said defendant as a faithful, chaste, and obedient wife; that said defendant has since said marriage been guilty of adultery, and that

the said plaintiff has not since the discovery of the same condoned said offense.

"It is therefore considered and adjudged, first, that the said defendant be divorced from said plaintiff, and that said divorce be from the bonds of matrimony.

"The court further finds that the only issue of said marriage is one child, to-wit, David Albert Small. It is further ordered, adjudged, and decreed that the said plaintiff is, until otherwise ordered by the court, entitled to the sole possession of the following described premises, to-wit, the south 35 feet of lot 2, in block 6, in Patrick's 1st addition to the city of Omaha; said property being the homestead of the said plaintiff.

"That said plaintiff have and recover from said defendant the sum of \$20 per month alimony; said alimony to date from January 1, 1889, but to be paid upon the first day of each succeeding month, and that said defendant pay the costs of suit."

The defendant appeals.

Without attempting to review the evidence at length it is sufficient to say that it fully sustains the finding of the court as to the charge of adultery against the defendant, while the counter charge made by the defendant against the plaintiff is not sustained.

The care and custody of the only child, the issue of said marriage, was, on the proof in the record, properly given to the plaintiff.

The decree of \$20 per month as alimony, in addition to the homestead, appears to be excessive. In apportioning alimony the court will consider the ability of the husband, the estate, if any, of the wife, and the situation of the parties, and will render such a decree as under the circumstances will be just and equitable. (*Smith v. Smith*, 19 Neb., 715; *Shafer v. Shafer*, 10 Id., 472.) The resources of the defendant are quite limited, as well as those of the plaintiff. In order to protect her in the enjoyment of the home-

Springfield Ins. Co. v. McLimans.

stead it may be necessary to make a further order in regard to the same, but that question is not now before the court.

The decree will be modified by omitting therefrom the provision for \$20 per month as alimony, and as thus modified the decree is affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

SPRINGFIELD F. & M. INS. CO. V. MCLIMANS & COYLE.

[FILED FEBRUARY 25, 1890.]

1. **Insurance: NON-OCCUPANCY OF PREMISES.** A mere temporary absence of the occupant of a building therefrom will not render void a policy of insurance which contains a provision that the policy shall become void in case the building becomes vacant.
2. ———: **FORFEITURES** are not favored, and should not be enforced unless the courts are compelled to do so, and this rule applies to insurance policies.
3. ———: **BREACH OF CONDITION: WAIVER IMPLIED.** Where the insured property was situated in an adjoining state and the persons insured were residents of this state, but the agent of the insurance company, through whom the insurance was effected, resided near the property insured, and had notice of the uses to which the building was applied, his knowledge will be deemed that of the company, and it will be too late after a loss has occurred to object upon the ground that the building was applied to uses prohibited in the policy.
4. ———: **CONSTRUCTION OF POLICY.** A policy of insurance is to receive a reasonable construction, and, if possible, one that will carry its provisions into effect.

ERROR to the district court for Madison county. Tried below before NORRIS, J.

R. W. Barger, and *Allen & Robinson*, for plaintiff in error, cited, on the question of the abandonment of the premises:

28	846
38	148
28	846
40	837
28	846
54	498
28	846
60	841
28	846
62	679
62	803

Dennison v. Phoenix Ins. Co., 52 Ia., 459; *Sexton v. Hawk-eye Ins. Co.*, 69 Id., 101; *Fesh v. Council Bluffs Ins. Co.*, 74 Id., 676; *Snyder v. Fireman's Fund Ins. Co.*, 77 Id., 146; *Keith v. Quincy Mut. F. Ins. Co.*, 10 Allen [Mass.], 228; *Ashworth v. Builders' Mut. Ins. Co.*, 112 Mass., 422; *Corrigan v. Conn. Fire Ins. Co.*, 122 Id., 298; *Litch v. Ins. Co.*, 136 Id., 491; *Sleeper v. N. H. F. Ins. Co.*, 56 N. H., 401; *Paine v. Agr. Ins. Co.*, 5 N. Y., 619; *Herman v. Adriatic Ins. Co.*, 85 Id., 163; *Whitney v. Black River Ins. Co.*, 9 Hun [N. Y.], 39; *Barry v. Prescott Ins. Co.*, 35 Id., 601; *Aetna Ins. Co. v. Myers*, 63 Ind., 238; *Niagara F. Ins. Co. v. Drda*, 19 Ill. App., 70; *Cook v. Continental Ins. Co.*, 70 Mo., 610; *Fitzgerald v. Conn. F. Ins. Co.*, 64 Wis., 463; *Aetna Ins. Co. v. Burns*, 5 Ins. L. J., 69; *Bennett v. Agr. Ins. Co.*, 12 Id., 569; 1 Wood, Fire Ins., 216, note.

H. C. Brome, contra, cited on the same point: *Phoenix Ins. Co. v. Tucker*, 92 Ill., 64; *Stupetski v. Transatlantic Ins. Co.*, 43 Mich., 373; *Shackleton v. Sun Fire Office*, 55 Id., 288; *Laselle v. Hoboken F. Ins. Co.*, 43 N. J. L., 468; *Cumins v. Agr. Ins. Co.*, 67 N. Y., 260; *Whitney v. Black River Ins. Co.*, 72 N. Y., 117; *Herman v. Merchants Ins. Co.*, 81 Id., 184; *Woodruff v. Imperial Ins. Co.*, 83 Id., 133; *Chandler v. Commerce F. Ins. Co.*, 88 Pa. St., 223; *Franklin Ins. Co. v. Kepler*, 95 Id., 492; *Atlantio Ins. Co. v. Manning*, 3 Colo., 224; *Hartford Ins. Co. v. Smith*, Id., 422; *East Texas F. Ins. Co. v. Dyches*, 56 Tex., 565; *Williams v. North Ger. Ins. Co.*, 24 Fed. Rep., 625; *Kelley v. Home Ins. Co.*, 2 Cent. Law J., 478.

MAXWELL, J.

Upon the 23d day of February, 1886, plaintiff in error issued to McLimans & Coyle its policy of insurance against fire to the amount of \$600, on their two-story frame building, occupied in lower room as a billiard hall and in upper story for a dwelling, and situated on lot 7,

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block 54, Ogden, Iowa, for the period of one year from date thereof. Upon Saturday night, February 12, 1887, at about 12 o'clock, a fire occurred which destroyed said building. Upon the 7th day of April, 1887, the defendants in error having made an affidavit for proof of loss at Ogden, Iowa, by the direction of one Sylvester, who had countersigned and delivered said policy as agent for the insurance company, sent the same to one Alverson, the state agent of said insurance company, at the city of Des Moines, Iowa. Upon the 16th day of September, 1887, the defendants in error filed their petition in the district court of Madison county, Nebraska, and thereupon a summons was issued therefrom, which was returned as served by delivering a certified copy to one J. F. Duncan, agent of the Springfield Fire & Marine Insurance Company in Madison county, Nebraska. A motion was made to dismiss, as in *Insurance Co. of North America v. McLimans*, lately decided by this court (*ante* p. 654), which motion was overruled; and as we decided in that case that there was no error in overruling the motion, the matter will not be further considered.

Upon the overruling of the motion the company filed an answer, in substance as follows:

"That it was provided in the policy that 'If the above mentioned premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied, and so remain without notice to and consent of this company in writing, then, in every such case, this policy is void.'

"And defendant says that after said policy was made and accepted, and prior to the occurrence of the alleged loss and damage by fire, the said building therein described, without notice to defendant and without the knowledge of defendant, and without its consent in writing indorsed on said policy, or otherwise expressed, became vacant and unoccupied, and so remained vacant and unoccupied up to and at the time the alleged loss and damage is said to have oc-

curred; defendant therefore says that prior to the occurrence of said loss and damage, said policy became absolutely null and void, and has ever since so remained."

The court, at the request of the insurance company, gave the following instructions:

"If you find from the testimony that upon the 7th day of April, 1887, McLimans, one of the plaintiffs in the action, made an affidavit before Earl Billings, a notary public in and for Boone county, Iowa, and afterwards furnished the same to the defendant company as and for proof of loss, in which affidavit he stated that said building was occupied, when burned, by one Stephens as a dwelling and billiard hall, and you further find that when said building was burned it was not so occupied by said Stephens as a dwelling and billiard hall, and also that said McLimans knew when he made and delivered said affidavit to defendant that said building was not occupied as therein stated, then your verdict should be for defendant.

"If you find from the evidence that in an affidavit made by McLimans, one of the plaintiffs in this case, before Earl Billings, a notary public in and for Boone county, Iowa, on or about April 7, 1887, and which affidavit he afterwards sent to defendant, that said McLimans falsely swore that said building when it was burned was occupied by one Stephens as a dwelling or residence and that he knew when he made and furnished said affidavit to the defendant company that the said building was not so occupied by said Stephens as a dwelling, then your verdict should be for the defendant.

"If you find from the evidence herein that after the policy sued on in this action was made and accepted, the building insured was used for the purpose of storing, or keeping therein for sale and for selling therein beer or intoxicating liquors, then such use of the building would render said policy void, unless you further find that the defendant had notice of such use of the building and con-

Springfield Ins. Co. v. McLimans.

sentent thereto by a person authorized to give consent thereto for the defendant."

The first instruction above set forth submitted to the jury the question whether or not the premises were vacant within the meaning of the terms of the policy when the fire occurred. It was certainly very favorable to the company. A party by effecting insurance upon his dwelling does not thereby impliedly agree that he will remain on guard to watch for the possible outbreak of a fire. He insures his property as a precaution against possible loss. If he is indebted, his duty to his creditors requires this; and if not in debt, his duty to his family may induce him to procure the insurance. He is not to become a prisoner on the property, however, nor to be charged with laches when, in the pursuit of his business, health, or pleasure, he temporarily leaves the property which still remains his home. The necessity of most persons for temporary absences on business or family convenience is known to every one and must have been in the contemplation of the insurer when the policy was issued.

A policy of insurance is to be so construed, if possible, as to carry into effect the purpose for which the premium was paid and it was issued. If it does not in fact insure the property covered by it and since destroyed by fire, then the savings of a lifetime may be lost because from a technical defect which did not affect the risk the company is enabled to evade its duty.

Forfeitures are odious in law and should never be enforced unless the court is compelled to do so. (*Dickenson v. State*, 20 Neb., 81; *Estabrook v. Hughes*, 8 Id., 496; *Hibbeler v. Gutheart*, 12 Id., 531.)

The business of an insurance company is to indemnify those of its patrons who have paid the amount demanded for the risk and sustained loss. Where the loss has not happened through the fault of the insured, why should the insurer be permitted to retain the premium and refuse to

perform its contract, or upon what principles of justice are courts required to search for technical objections to relieve it from liability and thereby defraud its patrons? A substantial compliance with the contract is all that is required. A mere temporary absence, which at the most is all that is shown in this case, would not affect the risk. (*Stupetski v. Transatlantic Fire Ins. Co.*, 43 Mich., 373; S. C. 5 N. W. Rep., 401; *Cummins v. Agricultural Ins. Co.*, 67 N. Y., 260; *Herrman v. Merchants Ins. Co.*, 81 Id., 184; *Phœnix Ins. Co. v. Tucker*, 92 Ill., 64; *Dennison v. Phœnix Ins. Co.*, 52 Iowa 457; S. C. 3 N. W. Rep., 500.)

Of the defense that intoxicating liquor was sold in the building in violation of the statutes of Iowa, it is sufficient to say that the testimony shows that the defendants in error resided at Norfolk, Nebraska, while the agent of the company resided in the town in Iowa where the property was situated and near such property, and he seems to have been fully advised of the purposes for which the building was used. His business was to receive premiums and deliver policies. He could not shut his eyes to plain facts which he must have seen and known and the company plead ignorance thereof.

There is no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

Grand Island Gas Co. v. West.

28	852
29	154
28	852
32	750
28	852
60	624

GRAND ISLAND GAS CO. V. JOHN W. WEST ET AL.

[FILED FEBRUARY 25, 1890.]

1. **CITIES: CONTRACTS: OFFICERS INTERESTED IN.** All officers of a city are prohibited from being directly or indirectly interested in any contract or agreement to which the city, or any one for its benefit, is a party, and such contract may be avoided by the city.
2. ———: ———: ———: **INJUNCTION.** The Grand Island Light & Fuel Company, a corporation, contracted with the city of G. I. to light its streets with electricity for a definite period, at a fixed price per month; at the time of the making of said contract, one W. was a member of the city council of G. I. and also a stockholder in and the secretary and treasurer of said corporation. *Held*, That the contract is illegal and that a taxpayer can maintain an action to cancel the same.
3. ———: ———: ———: **BENEFITS ACCEPTED: PAYMENT REQUIRED.** *Held*, That inasmuch as the city has accepted the benefits of the contract, it must do equity, and to do equity the city must pay to the Light & Fuel Co., not exceeding the contract price, the reasonable value of the light received by it, prior to the commencement of the action, with seven per cent interest thereon.

APPEAL from the district court for Hall county. Heard below before HARRISON, J.

O. A. Abbott, and R. R. Horth, for appellants:

Appellee was a competing bidder for the contract, with full knowledge of the alleged disability of its successful competitor. It was guilty of gross laches in failing to assert its rights as a taxpayer in time, and is now estopped to do so. (*Clark v. Dayton*, 6 Neb., 192; *Follmer v. Nuckolls County*, Id., 204; *Brown v. Merrick County*, 18 Id., 355; *Tash v. Adams*, 10 Cush. [Mass.], 252; *Chamberlain v. Lyndeborough*, 23 Am. & Eng. Corp. Cas., 609.) The Light & Fuel Co. would be entitled to compensation for

services rendered, even if it were not without fault in connection with the contract. (*Thomas v. Brownville, etc., R. Co.*, 109 U. S. 522.) The city should either have ratified the contract, and claimed its benefits, or repudiated it entirely; it could not do both. (Story, Agency, sec. 210 and cases.) Its passive acceptance of the benefits, and acquiescence in the performance, are negative acts of ratification, as binding as a formal instrument.

Thompson Bros., contra:

The contract was in violation of the statute (sec. 46, ch. 14, Comp. Stats., 1887), and contrary to public policy, and whether or not it was reasonable and just, was immaterial. (*State v. Jersey City*, 34 N. J. L., 390; *McCortle v. Bates*, 29 Ohio St., 419; *Gardner v. Ogden*, 22 N. Y., 332; *Butts v. Wood*, 37 Id., 317; *Smith v. Albany*, 61 N. Y., 444; *Bd. Com'rs v. Reynolds*, 44 Ind., 509; *Fort Wayne v. Rosenthal*, 75 Id., 156; *McGregor v. Logansport*, 79 Id., 166; *Mayor v. Huff*, 60 Ga., 222; *Thomas v. Richmond*, 12 Wall. [U. S.], 349; *Keating v. City of Kansas*, 84 Mo., 415; *Buck v. First Nat. Bk.*, 27 Mich., 293; *People v. Board*, 11 Id., 222; *Martin v. Wade*, 37 Cal., 68; 1 Dillon, Mun. Corp., 436; 29 Cent. Law J., 309, and cases cited.) There is a radical distinction between a contract which is illegal through failure to comply with a formality of law, and one which is in violation of the city charter and of public policy. (*Brown v. Merrick County*, 18 Neb., 364; *East St. Louis v. G. L. & C. Co.*, 98 Ill., 415; 1 Wharton, Contracts, sec. 43.) The latter cannot be ratified and neither a city nor a taxpayer can be estopped by laches from enjoining performance thereof. (*Reichard v. Warren County*, 31 Ia., 381; *Durango v. Pennington*, 8 Colo., 257; *Churchman v. Indianapolis*, 110 Ind., 259; 2 Rorer, Railroads, 943.) To allow appellants to recover on a *quantum meruit* would be offering a bonus for entering into illegal and prohibited contracts.

NORVAL, J.

On the 22d day of May, 1888, one of the defendants, the Grand Island Light & Fuel Company, entered into a written contract with the city of Grand Island to furnish the city electric light for an agreed price per month, for the period of one year, with the privilege of two years at the option of the city. The Light & Fuel Company furnished light under the contract during the months of July, August, September, October, and November of that year, and presented bills to the city council therefor, and the same were duly audited and allowed. The plaintiff, as a taxpayer, brought an action in the district court of Hall county against the various officers of the city and the Light & Fuel Company to restrain the city from paying the two warrants drawn in payment of the light so furnished to the city and to cancel and annul the said written contract, and to restrain the city from allowing or paying for any light so furnished, or thereafter furnished, under said contract. A trial was had, and a decree was rendered in favor of the plaintiff, restraining the city from paying the warrants in question, or for any light that had been or might be thereafter furnished, and restraining the Grand Island Light & Fuel Company from prosecuting any suits at law or in equity to recover any compensation for any light furnished, or that it might thereafter furnish. The defendants appeal.

It appears from the pleadings and the evidence that at the time of the entering into of said contract, one Charles Wasmer was a member of the city council of the city of Grand Island, and at the said time was a stockholder in and was the secretary and treasurer of the Grand Island Light & Fuel company, a corporation; that said Wasmer continued to be the secretary and treasurer of said company until about December 1, 1888; that the claims as allowed by the city were for the contract price; and that the plaintiff and other taxpayers protested against

the city recognizing said contract on the ground that said Wasmer was a stockholder and officer of said Light & Fuel Company.

It is claimed that the contract is void because the same was against public policy, and for the further reason that the contract was prohibited by statute. The precise question presented by the record for our consideration and decision has never been passed upon by this court. That an agent cannot act in a double capacity is elementary. The fact that the principal is a municipal corporation instead of a natural person, does not change the rule. The obligations and duties resting on a member of a city council are of such a character that he will not be allowed to reap any advantage his position may give, to speculate at the expense of the municipality. He must act solely for the welfare of the city. The temptation would be great to abuse the confidence reposed in him by the people if allowed to contract with it. That an action cannot be maintained on such a contract is well sustained by the authorities.

Judge Dillon in his work on Municipal Corporations, in discussing this question, says, sec. 444: "It is a well established and salutary rule in equity, that he who is entrusted with the business of others cannot be allowed to make such business an object of pecuniary profit to himself. This rule does not depend upon reasoning technical in its character and is not local in its application. It is based upon principles of reason, of morality, and of public policy. It has its foundation in the very constitution of our nature, for it has authoritatively been declared that a man cannot serve two masters, and is recognized and enforced wherever a well regulated system of jurisprudence prevails. One who has power, owing to the frailty of human nature, will be too readily seized with the inclination to use the opportunity for securing his own interest at the expense of that for which he is entrusted. It has, therefore, been said that the

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wise policy of the law has put the sting of disability into the temptation as a defensive weapon against the strength of the danger which lies in the situation. This conflict of interest is the rock, for shunning which the disability under consideration has obtained its force, by making that person who has the one part entrusted to him incapable of acting on the other side, that he may not be seduced by temptation and opportunity from the duty of his trust. The law will in no case permit persons who have undertaken a character or a charge to change or invert that character by leaving it and acting for themselves in a business in which their character binds them to act for others. The application of the rule may in some instances appear to bear hard upon individuals who had committed no moral wrong; but it is essential to the keeping of all parties filling a fiduciary character to their duty to preserve the rule in its integrity, and to apply it to every case which justly falls within its principle. The principle generally applicable to all officers and directors of a corporation is that they cannot enter into contracts with such corporation to do any work for it, nor can they subsequently derive any benefit personally from such contract."

The council of the city of Albany contracted with one of its members to furnish horses and carriages for the parade at a 4th of July celebration. He did so and brought an action to recover payment. It was held in *Smith v. City of Albany*, 61 N. Y., 444, that he could not recover. The court in the opinion uses this language: "The common council of the city of Albany, of which the plaintiff was a member, were the agents of the city, and while holding that relation to it each member of that body was under such an obligation of absolute loyalty to the interests of the city as prohibited any member of the board from entering into any arrangement with his associates by which his individual interests could come in conflict with the interests of his constituents, who are entitled

exclusively to such an exercise of his caution and judgment in their behalf as an ordinarily prudent man would exercise in his own business. In bargaining for the city he could not be one of a party acting as an employer, and become himself, by the same bargain, an employe."

In *People v. Township Board*, 11 Mich., 222, a contract similar to the one at bar was held void. We quote the following from the opinion in that case: "All public officers are agents, and their official powers are fiduciary. They are trusted with public functions for the good of the public; to protect, advance and promote its interests, and not their own. And a greater necessity exists than in private life for removing from them every inducement to abuse the trust reposed in them, as the temptations to which they are sometimes exposed are stronger and the risk of detection and exposure is less. A judge cannot hear and decide his own case, or one in which he is personally interested. He may decide it conscientiously and in accordance with law. But that is not enough. The law will not permit him to reap a personal advantage from an official act performed in favor of himself. * * * * We think it no exception to the rule we have stated that all the contractors were not members of the board of freeholders, or that those who were members were a minority of the board. The rule would not amount to much if it could be evaded in such way. It might almost as well not exist, as to exist with such an exception. The public would reap little or no benefit from it."

To the same effect is the case of *McGregor v. City of Logansport*, 79 Ind., 166. The following is the syllabus in the case: "It is unlawful for any officer of a city to be a party to or in any manner interested in, any contract or agreement with the city, whereby any liability or indebtedness may be incurred by the city. And the common council of a city cannot make a valid contract with the city judge for the use of his office as a city court room."

The following authorities are to the effect that contracts like the one at bar are against public policy and cannot be enforced in the courts: *Mayor, etc., of Macon v. Huff*, 60 Ga., 221; *Fort Wayne v. Rosenthal*, 75 Ind., 156; *Wardell v. U. P. R. R. Co.*, 103 U. S., 658; *Village of Dwight v. Palmer*, 74 Ill., 295.

For the purpose of preventing officers of a city from abusing the important trust committed to them, section 49 of the act (art. 2, ch. 14, Comp. Stats.) governing cities of the second class was passed, which reads: "No officer of any city shall be interested, directly or indirectly, in any contract to which the corporation, or any one for its benefit, is a party; and such interest in any such contract shall avoid the obligation thereof on the part of such corporation."

This section is broad and sweeping in its terms. It is obvious that a contract entered into with a city in which any of its officers have directly or *indirectly* a pecuniary interest, cannot be enforced against the corporation. Wasmer being a stockholder and officer of the Light & Fuel Company and also a member of the city council when the contract was entered into, brings the case clearly within the purview of the statute. Whether an action on a *quantum meruit* could be maintained does not arise in this case, and we express no opinion thereon. What we do hold, is that an action cannot be maintained against the city on such a contract, and where the contract has not been performed, a taxpayer may maintain an action to restrain the enforcement thereof. Where, as in the case at bar, the contract has been in part executed and the city has received benefits under it, the contract will not be canceled without the city returning the benefits it has accepted. It would be of the highest degree inequitable and unjust to permit the city to repudiate the contract and retain the benefits.

It appears from the record before us that the Grand Island Light & Fuel Company, prior to the commence-

ment of this action in the lower court, had furnished under its contract to the defendant city electric light for five months, and for which the city audited two claims, one for \$291.33, and the other for \$821.81, the payment of which is enjoined by the decree of the district court. The undisputed evidence is that said sums are the reasonable value of the light furnished the city under the contract. We think the court erred in enjoining the payment of these claims allowed by the city council. The city has claimed the benefit of the contract by appropriating the light thus furnished, and it would be inequitable to cancel the contract without restoring to the Light & Fuel Company, not exceeding the contract price, the reasonable value of the light thus appropriated prior to the bringing of this suit. It is a familiar rule that he who seeks equity must do equity. The fact that the contract under which the light was furnished was illegal, can make no difference. It does not relieve the municipality from being just.

In *Eiseman v. Gallagher*, 24 Neb., 79, it was held that "where a borrower goes into a court of equity to seek relief from an usurious contract, he must tender the amount of the principal and lawful interest, and it is the duty of the court in granting relief to render a decree for the actual amount of the loan, with 7 per cent interest thereon."

The case of *Mayor, etc., v. Huff*, 60 Ga., 221, is quite in point. In that case Huff, while mayor of Macon, contracted with the city council to lease the city park for five years, and, for an annual sum paid him, to fence, drain, and keep the same in repair for that period. An action was brought to annul the contract. While it was held void, the city was compelled to reimburse Huff for what he had expended. We quote the third point of the syllabus in that case: "Equity, however, requires every litigant who seeks her aid to do equity; and inasmuch as the defendant has expended large sums of money in fencing, levying, draining, and ornamenting the park, of which the

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city has received the benefit, equity will not interpose in behalf of the complainant to annul and set aside the contract, though thus illegal, unless the complainant shall first do equity, and to do equity the city must pay the defendant the money so expended and interest thereon, and thus restore him, as far as practicable, to his *statu quo*, in the absence of actual fraud on his part."

The same principle was fully recognized in the case of *Turner et al. v. Cruzen et al.*, 30 N. W. Rep. [Iowa], 483. That was an action brought by a taxpayer of Adams county to cancel a contract entered into between the county and the defendant Cruzen, whereby the county purchased of him a farm for the use of the county as a poor farm, for the agreed price of \$8,800, and also to restrain the treasurer of the county from paying certain warrants issued under the contract. The purchase was unauthorized, having been made without a vote of the people. Chief Justice Adams, in the opinion in that case, says: "It may be that the intention in decreeing the invalidity of the contract was merely to afford a basis for enjoining the payment of warrants issued for a part of the purchase money. If this is so, then the court proceeded upon the theory that the county could be relieved of a part of the burden of its contract, while retaining the entire benefit of it. Of such decree the county could not, of course, complain. But such a decree cannot, in our opinion, be sustained. It appears to us to be well settled as a rule, with one exception, that, where the consideration received by a corporation under an *ultra vires* contract can be restored, a court of equity will not relieve the corporation, as against the contract, without providing for a restoration of the consideration." The following authorities sustain the same equitable doctrine: *Co. Com'rs Lucas Co. v. Hunt*, 5 O. St., 488; *Argenti v. San Francisco*, 16 Cal., 282.

The decree of the district court, therefore, should have required the city to pay the two warrants issued on the

claims allowed, and also to pay, not exceeding the contract price, the reasonable value of all light furnished the city under the contract up to the commencement of this action in the court below, with 7 per cent interest thereon, first deducting the amounts of said warrants.

It is claimed that because the other members of the city council, at the time of the letting of the contract, knew that Wasmer was a stockholder of the company, the contract is valid. This is certainly untenable. The right of the city or a taxpayer to avoid the contract is not affected by the fact that no wrong was practiced upon the city.

The plaintiff has not been guilty of such laches as to bar it from maintaining this suit. The allegations and proof are that the plaintiff continually protested against the performance of the contract. It was diligent in the assertion of its rights as a taxpayer.

It is also urged that the action of the council, in extending the time of performance of the contract and in auditing and allowing the claims for the light furnished, was an affirmance and ratification of the contract. During all this time Mr. Wasmer remained as a member of the city council and also a stockholder in the Light & Fuel Company; and it is clear if the council could not make a valid contract in the first instance on account of the interest of one of its members in the contract, it could not make it valid by any subsequent acts of the council while that interest remained. The evidence shows that Mr. Wasmer resigned as secretary and treasurer of the company before the claims were allowed, but we find no evidence in the bill of exceptions that he had ceased to be a stockholder.

The decree of the district court is therefore modified in accordance with the views herein expressed, and as thus modified is affirmed.

JUDGMENT ACCORDINGLY. •

THE other judges concur.

THOMAS L. CORNELL V. WILLIAM H. BARNUM.

[FILED FEBRUARY 25, 1890.]

Review. When a cause is submitted to this court without either a brief or oral argument, and no error appearing upon the face of the record, and the verdict not being against the evidence, the judgment will be affirmed.

Case & McNeny, and G. M. Lamberton, for plaintiff in error.

No appearance *contra*.

NORVAL, J.

This cause is here on error to the district court of Nuckolls county. The plaintiff in error was the defendant in the court below. The allegations of the petition are, "That on or about the 8th day of November, A. D. 1884, the plaintiff was the owner of the west half of the north-west quarter of section 3, township 4 north, of range 7 west, in Nuckolls county, which he then sold to said defendant Cornell, who requested and induced this plaintiff to make the deed therefor to one E. A. J. Moss; that the consideration for said deed was to be \$1,600, which was its reasonable and fair value, and the deed was made and delivered in pursuance of said agreement. The consideration or purchase price was to be paid by the defendant as follows: Defendant to assume all liens on said land to the amount shown of record, being about \$600, and for the remaining \$1,000 defendant agreed to furnish to this plaintiff 335 ewes not less than two nor more than three years old, the same to be good, healthy, and sound sheep, worth at least \$8 per head. This plaintiff having no knowledge of the age of the sheep or value and quality, relied upon the statement made to him by said defendant and the representa-

tions that said sheep were good, young, and healthy ewes, and was thereby induced to trade for the same. Plaintiff says that the statements so made by the defendant were false; that the sheep delivered to this plaintiff by said defendant were old and nearly worthless; that by reason of their extreme age they had lost their teeth and were unable to eat and a large number by reason thereof died; that the remainder were not worth to exceed one dollar per head and were the refuse of the flock; that by reason of said sheep not being as they were represented by the defendant to plaintiff, and by reason of said false and fraudulent representations so made by the defendant, which were relied upon by the plaintiff as true, this plaintiff has been damaged in the sum of \$700, no part of which has been paid."

The answer of the defendant admits trading the sheep for the farm, but claims he gave the plaintiff a written warranty representing the sheep to be "two years old and over and healthy;" that plaintiff examined the sheep before taking them and said they were all right, and that he was satisfied; that the sheep were healthy and not less than two years old, and in all respects fully complied with the warranty.

The reply of the plaintiff denies the allegations of the answer.

The cause was tried to a jury, which returned a verdict assessing plaintiff's damages at \$723.60.

The defendant filed a motion for a new trial containing twenty-nine assignments of error, viz:

1. Irregularity in the proceedings of the court, and abuse of discretion by which defendant was prevented from having fair trial.

2. Misconduct of the jury and prevailing party.

3. Error in the assessment of the amount of recovery, the same being too large.

4. The verdict is not sustained by the evidence.

5. Errors of law occurring at the trial.

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The remaining assignments of error consisted in the giving and refusing of instructions.

The plaintiff having remitted \$23.60, the motion for a new trial was overruled and a judgment was rendered for \$700.

The petition in error contains the following assignments of error:

1. The court erred in refusing to permit the plaintiff herein to testify where he purchased the sheep in controversy.

2. The court erred in aiding the attorney of the defendant herein by examining and cross-examining witnesses in his behalf.

3. The court erred in giving instructions Nos. 1 to 14 inclusive.

4. The court erred in refusing to give instructions 1 to 9 inclusive, requested by the plaintiff in error.

5. The court erred in overruling the motion for a new trial.

The cause is submitted to this court on the record, without either brief or oral argument to aid us in our investigation.

It is claimed that the court erred in refusing to permit the plaintiff in error, when a witness in his own behalf, from answering this question, "Where did you get this particular flock of sheep?" The question was an immaterial one. The issue to be tried was not where Cornell obtained the sheep, but rather, what representations, if any, he made to Barnum at the time of the sale, as to the age and condition of the sheep, and if any representations were made, whether or not they were untrue. There was no evidence given which in the least tended to make the answer sought to be elicited by the question pertinent to the case. No error, however, can be predicated upon the ruling of the court in sustaining the objection to the question, for the obvious reason that the plaintiff in error made no offer to prove where he purchased the sheep.

It is next urged that the court erred in aiding the attorney of the plaintiff below in the examination of witnesses. The record discloses that the learned judge who presided at the trial propounded but a single question to one witness during the entire trial. This question was competent, and clearly there was no abuse of discretion in asking it.

Complaint is also made in the motion for a new trial of the conduct of the jury and prevailing party. There is not a line in the record tending to show any misconduct on the part of either the jury or the defendant in error.

An exception was taken to each of the fourteen instructions given to the jury. Upon examination we find that they fully and fairly submitted the issues in the case to the triers of fact. The instructions that were requested by the plaintiff in error having been substantially covered by the charge of the court, were properly refused.

The evidence in the case is quite conflicting. There is, however, sufficient testimony in the bill of exceptions to sustain the verdict of the jury, and it will therefore be upheld.

No error appearing in the record, the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JOSEPH BURNS V. CITY OF FAIRMONT.

[FILED FEBRUARY 25, 1890.]

1. **Evidence: DIRECTION OF VERDICT.** Where there is not sufficient evidence to authorize a verdict for the plaintiff, it is the duty of the court to direct a verdict for the defendant.
2. ———: **OBJECTION.** When a question is asked a witness, to which objection is made, which is sustained, the party desiring the evidence must offer to prove the facts sought to be introduced as evidence. (*Mathews v. State*, 19 Neb., 330.)

ERROR to the district court for Fillmore county. Tried below before MORRIS, J.

John Barsby, and Pound & Burr, for plaintiff in error.

Maule & Sloan, contra.

NORVAL, J.

The plaintiff, Joseph Burns, brought this action to recover the sum of \$656, claimed as a balance due him from the city of Fairmont on the following contract:

"LINCOLN, NEB., Jan. 12, 1887.

"To the Hon. Mayor and City Council of Fairmont, Neb.:
GENTLEMEN—I herewith hand you a proposal to furnish your city a water supply of (6400) sixty-four hundred gallons or (200) two hundred barrels of water per hour for (24) twenty-four consecutive hours' pumping, and I guarantee that said supply shall hold good for (6) six days, commencing my work in the bottom of your well now dug and walled up, and putting down an iron pipe (5) five inches in diameter to a sufficient water supply to furnish the quantity of water above called for, and furnish a first-class point (4) inches in diameter and of a sufficient length to admit of a free, easy flow of the water, putting in a section

28	806
28	806
28	806
35	416
28	806
38	110
28	806
40	11
40	515
28	806
46	304
28	806
48	613
28	806
61	317

of screen pipe or point at each vein of water, should it be deemed necessary, to secure the easy flow mentioned. I will furnish all material and do all the work to complete the work and do a first-class job in every particular. I will also put on a T on the top of the drive pipe in the dug well at or below the water line and move your steam pump over from its present well to the dug well, furnishing 10x12 timbers for a foundation and running through the wall and back in the ground, laying the end outside of the wall in a brick and mortar foundation, and then plank over or floor over with two-inch plank, putting this foundation down in the dug well at least ten feet from the surface of the ground, and then cut the pipes and fit the same with pump and all its connections so that it will stand on the above-mentioned platform in the well, all connected and fitted with one branch of the tee on the drive pipe at the bottom of the well. I will also put on the other branch of the tee a 4½x14 inch cylinder, fitting the same with the discharge pipe and plunging rod running to the top of the well, connecting the discharge with the discharge pipe from the steam pump, the latter to be connected with the present discharge already laid.

“Also, furnish and set upon a fifty-foot tower a twenty-two foot Aldrich mill, known as the Nebraska Chief in this state, (the timbers and size of tower to be about the same as the one belonging to the B. & M. R. R. in Fairmont, and to be securely anchored, and the timbers of tower to be dressed lumber), doing all work and furnishing all material necessary to construct and erect the same in a first-class manner. I will also disconnect the boiler from all its fastenings and lower it, after first digging down the boiler room the full size of said room, deep enough to permit of a floor to be laid on the present sills under the building without the boiler or any of its points interfering with or reaching the floor above. I will then drift or tunnel from the boiler room to the pump platform over the

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well, making it six feet high and three feet wide, cribbing the sides and top with two-inch plank, then connecting and fitting all steam pipes with pump, making a good and workmanlike job of the same in every particular, as good as it was before moved; in this it is not meant to include the foundation under the wall in the boiler house. The city also agreeing to give me all the pipe that is now in the wells attached to the pump or drove in the ground, if I can pull it, at my own expense. I to finish and complete the work; including everything necessary to furnish the water and make the change, except the foundation mentioned, all finished and complete, for the sum of (\$1956) nineteen hundred and fifty-six dollars, to be paid me when the work shall be finished and tested and shown to fulfill the conditions of this contract as per above; the whole to be completed in ninety days from this date; the contract forfeited if not completed at that time, if due diligence is not shown by me in endeavoring to complete the work; and it is especially understood that the steam pump shall remain as it now is and in such condition that the water from the well now there can be used until the new well is ready for use, I to have the use of the boiler by furnishing fuel and engineer, providing I do not at any time interfere with the use of the boiler and the pump by the city.

“(Signed)

JOSEPH BURNS.

“The above proposition is accepted on the part of the city of Fairmont, Neb., this 15th day of January, A. D. 1887.

“(Signed)

JOHN BARSBY, *Mayor*.

“Attest:

“C. M. CLARK,

“[SEAL.] *City Clerk.*”

The plaintiff alleges that he has in every respect complied with all the terms of the above contract on his part to be performed. On the other hand the defendant insists that the plaintiff has failed to furnish the quantity of

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water agreed upon. The cause was tried to a jury and a verdict, by direction of the court, was returned for the city. The plaintiff brings the case here for review by petition in error.

The principal question presented for our consideration is, Did the court err in instructing the jury to return a verdict for the defendant? It appears that the plaintiff has been paid on the contract \$1,300, and when the same was paid the city council of Fairmont entered upon its records the following, which was agreed to by the plaintiff:

"WHEREAS, A partial test has been made of the work done by Joseph Burns on his contract to supply water, and the council are not fully satisfied that the required amount has been fully furnished; and

"WHEREAS, Said Burns is desirous of receiving a portion of the money on said contract, and the council are agreed that it is proper that he do so; therefore, be it

"Resolved, That the sum of thirteen hundred dollars be advanced said Burns on said contract; provided such advance shall not be taken or construed as an acceptance or partial acceptance of said work, and shall not prejudice the rights of the city in any manner, and said Burns, by accepting said amount, agrees to these conditions; and further, the city shall have at least (4) four months from the passage hereof to fully satisfy themselves that said contract has been fulfilled, said Burns also waiving all technicalities or technical rights which may have accrued or shall hereafter accrue by the use by the city of the wells and machinery. Said Burns also agrees by the acceptance of said amount of money that all work done and all machinery furnished by him shall be the property of and belong to the city of Fairmont.

"Agreed to August 20, 1887. JOSEPH BURNS."

At the trial in the court below the parties stipulated that if the court was of the opinion that, under the terms of the contract, it was the duty of the plaintiff to make any

further test of the quantity of the water to be furnished said defendant, then the finding should be for the defendant, and if the court be of the opinion that the said plaintiff was not to make any further test of said quantity of water, then the finding should be for the plaintiff in the amount claimed in the petition.

The only testimony in the bill of exceptions in regard to the testing of the quantity of water in the wells was given by John Henry, who superintended the work for the plaintiff at Fairmont. His testimony on that subject is as follows:

Q. Did you see the pump they had to lift water with?

A. Yes, sir.

Q. What kind of a pump would you call it?

A. I would not call it any kind of a pump; I think the maker of it was ashamed to put his name on it; I did not see any name on it.

Q. You may state, then, how many barrels of water per hour could you lift up with that old pump.

A. I could not say, exactly; I should think about 250.

Q. For how long a time would the flow continue?

A. I can't tell. You can't produce any vacuum with that pump; it was all full of holes, and we had to plug it up with wooden plugs.

Q. Had it any suction capacity whatever?

A. Very slight—a little. A good pump will suck water about twenty-seven feet.

Q. State how many barrels per hour the old pump would raise out of the well, as furnished to you by the city of Fairmont.

A. Well, after we worked a good deal on the pump, it would raise about 175 barrels an hour.

Q. How did you measure the flow of water to know how many barrels of water it would raise?

A. I did not measure it. The city council measured it, and decided that that was about the amount.

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Q. Who was present at the test?

A. Mr. Cubbison, Mr. Gould, Mr. Moore, and I could not say whether the mayor was there or not. I would not be sure whether he was or not. They looked after it.

Q. How long did the test continue?

A. I did not time it. It continued an hour, I presume, or two hours, until a part of the machinery that we had rigged up broke.

Q. What was it broke?

A. It was a crank pin connected with the walking beam.

Q. Was that a proper pump to test this well by, in your opinion?

A. Which pump?

Q. The old one?

A. No, it was not.

Q. When the pump broke down was there any perceptible diminution in the flow of water from the well, up to the time when the pump broke down?

A. No, there was none. * * *

Q. When was it this test was made?

A. I have not got the date of it.

Q. About when?

A. I could not say.

Q. Was it made just prior to the 20th of August, 1887?

A. I don't know. I presume it was.

Q. Was it made prior to the payment of the money to Mr. Burns by the city?

A. I think it was.

Q. After you made that test, assuming that you made a test prior to the 20th of August, 1887, did you not make any further or other test of the quantity of water to be taken out of the well?

A. We had previous to that. * * *

Q. How many days of the test were you there?

A. I was there the first day.

Q. How did it work that day?

A. Very satisfactory.

Q. How many barrels per hour did it lift out of the well at that time?

A. I did not keep any record.

Q. Who did keep the record?

A. I can't tell.

Q. Who was present when the test was made?

A. I was part of the time, Mr. Burns, and the city officials.

Q. The mayor and council of the city?

A. Yes, sir.

Q. You say no other or further test of this well was made after about the 20th of August, 1887?

A. Not to my knowledge. I left after that.

* * * * *

Q. These two tests were made after the two pipes were driven?

A. Yes, sir.

Q. The flowing being into the well?

A. Yes, sir.

Q. When you first opened the first pipe that you drove, how much water did the rise in the tube indicate?

A. It stood about 100 feet deep in the tube. The well was about 109 feet from the bottom of the dug well, and it stood within about nine feet of the bottom of the dug well, showing about 100 feet of water.

Q. When you opened up the second pipe how much water did it indicate?

A. The same thing.

It clearly appears from the testimony that the tests made by the plaintiff failed to show that the wells were capable of furnishing a water supply of 200 barrels of water per hour for twenty-four consecutive hours' pumping and that such supply would be good for six days. The tests only showed a supply of 175 barrels for one or two hours. It does not appear that the tests were even continued for

twenty-four consecutive hours, much less for six days. By the terms of the contract the city was to pay when the work was finished and tested and shown to fulfill the conditions of the contract. The fact that the plaintiff partially tested the capacity of the wells shows that it was his understanding of the contract that he was required to demonstrate by practical means the quantity of water they were capable of supplying. The parties having thus construed the contract, we are warranted in adopting the same construction. Should the plaintiff yet make the required test he can recover.

The resolutions of the city council, under date of August 20, and signed by Mr. Burns, recognize that only a partial test had been made and that the council were not fully satisfied with the supply of water. It does not appear that any test was ever made after the payment of the \$1,300. Before the plaintiff could recover we think it was his duty to establish by evidence that the wells had the capacity to furnish the quantity of water called for by the contract.

The fact that the city has been using the wells and machinery does not waive the terms of the contract or prejudice the rights of the city. The plaintiff expressly agreed that it should not. There being no conflict in the evidence, and the plaintiff having failed to show that it had furnished the city the requisite supply of water, the court did right in instructing the jury to return a verdict for the defendant.

The plaintiff cannot complain of the failure of the court to reduce to writing its instruction to the jury. The parties stipulated that the court should instruct orally. (*Fitzgerald v. Fitzgerald*, 16 Neb., 414.)

The last contention is that the court erred in sustaining the defendant's objection to several questions propounded by the plaintiff to the witness Henry. Error cannot be predicated thereon, because the plaintiff made no offer to prove the facts sought to be introduced in evidence. (*Math-*

Burns v. City of Fairmont.

ex v. State, 19 Neb., 330; *Masters v. Marsh*, Id., 462; *Lipscomb v. Lyon*, Id., 522.)

There is no reversible error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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1. All officers of, are prohibited from being interested, directly or indirectly, in a contract to which the city, or any one for its benefit, is a party. *Grand Island Gas Co. v. West*.....852-55
2. Hence a contract for street lighting between a city and a corporation, one of whose stockholders is a member of the council of such city, is illegal, and a taxpayer may sue to cancel the same. *Id*..... 858
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4. Are required to use all reasonable care and supervision to keep their streets and sidewalks in a reasonably safe condition for travel in the ordinary modes; and are liable for failure so to do, provided a party injured in consequence thereof was exercising reasonable care. *City of Lincoln v. Smith*..... 768
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2. Where such magistrate has not jurisdiction, the preliminary examination is not such as is required by sec. 586 of the Criminal Code. *Id*.....341, 347

3. Title is no part of, and the names of two parties written in the upper left hand corner of a complaint charging larceny, will not make it a joint one if but one name appear in the charging part. *Id.*.....341, 343

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2. Question of whether certain correspondence constituted, held, to depend largely upon understanding and intention of the parties at the time, which was a question of fact for the jury. *Id.*.....306-7
3. Where it is shown by the pleadings that defendant in an action for the non-delivery of cattle, has treated the contract as a severable one, plaintiffs may treat as rescinded that portion of the contract still unexecuted, and sue for the recovery of money paid thereon. *Filley v. Walker*..... 520

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Where the doctrine is presented by an instruction, the fact is a question for the jury. *Stevens v. Howe*..... 565

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Where, on the second trial in the district court of a cause which has been remanded from the supreme court, judgment is rendered against the party who had been plaintiff in error for all costs in the case, such judgment will be

- modified so as to exclude all costs incurred in the supreme court. *R. V. B. Co. v. Fink*..... 402
- Councilman.** See ELECTIONS, 3, 4.
- Counties.** See TAXES.
- Causes of action against, under sec. 71 of the revenue act of 1869, are "claims" within the meaning of sec. 37, ch. 18, Comp. Stats., and no action can be maintained on such claims, except by presenting them to the county board for audit and allowance. *Richardson County v. Hull*..... 813
- County Attorney.** See ELECTIONS, 1, 2. JUDICIAL SALES, 2.
- County Bonds.**
- Baird v. Todd*, and *Jameson v. Dickson*, 27 Neb., 782, followed.
- Bonnell v. Nuckolls County*..... 91
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- Coupons.** See INTEREST, 2.
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- Criminal Law.** See COMPLAINT. EXAMINATION. INFORMATION. LIQUORS. RELIGIOUS SOCIETIES, 1-3.
- Where a judgment of conviction, rendered in the district court against one charged with larceny, is reversed in the supreme court on the ground that there had been no preliminary examination as required by law, such accused is not necessarily discharged thereby, but proceedings against him may be commenced anew by making complaint under oath without releasing him from custody. *White v. State*..... 349
- Cross-Examination.**
- Should be confined to matters covered by the examination in chief. *Mordhorst v. Telephone Co*..... 611
- Cross-Petition.** See NOTICE, 1.
- Damages.** See EMINENT DOMAIN.
- Where none of the witnesses, in an action for damages for non-performance of a contract, placed the value of the profits which would have arisen therefrom at less than \$239, a verdict for \$90 was set aside as not based on the evidence. *Hancock v. Stout*..... 305
- Decree.** See APPEAL, 1. JUDGMENTS. JUDICIAL SALES, 3.
- The fact that a summons which a deputy sheriff took to a house where a husband and wife lived, to serve on the latter, was received by the husband, who said that his wife was busy, but never delivered the summons to her or

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2. In such case, *bona fides* of subsequent purchaser must be proved independently of recitals in deed. *Id.*

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1. Where a summons issued by a justice of the peace is made returnable at 10 o'clock A. M., and the defendant does not appear, the justice, before rendering judgment by default, must wait one hour, till 11 o'clock, common time. *Searles v. Auerhoff* 609
2. Unless otherwise designated in the summons or shown by the proof, it will be presumed that common, not standard, time, was intended. *Id.*

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3. Where district court declares a contestant for the office of city councilman entitled thereto, a *superseas* bond, though duly filed and approved, will not stay the judgment, there being no statute so providing. *State, ex rel. Hunt, v. Mayor, et al., of Kearney*.....103, 110
4. In such case, a court of equity has no authority to enjoin contestant from taking possession of the office, and an appeal from the order dissolving a temporary injunction will not lie. *Id.*.....110, 111
5. Where a city is entitled to three justices of the peace, each to be elected from a separate district, and ballots are cast "For justice of the peace for the First district" and others "For justice of the peace for the Third district," the words describing the district do not constitute a part of the legal designation of the office and should be treated as surplusage. *State, ex rel. Easterday, v. Howe*.....629-30
6. In such case, ballots cast "For justice of the peace," simply, should be counted for the candidate from the Third district whose name appears thereon. *Id.*..... 630
7. The fact that owing to a conflict between certain statutes governing elections, votes were cast in other districts of the city for the candidates of the Third district, is no excuse for a refusal by the board of canvassers to count the legal ballots properly cast for such candidate. *Id.*..... 630
8. Where such board has canvassed but a portion of the returns, and issued a certificate of election, *mandamus* lies to compel it to reassemble, canvass the returns correctly, and issue a certificate to the one found elected from the whole returns, even though the other party has qualified and taken charge of the office. *Id.*..... 630

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 2. Motion for a new trial necessary in an equity cause taken to the supreme court on error, as well as in an action at law. *Carlou v. Aultman*..... 675
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2. The words "as against the person so hindered, delayed, or defrauded," in sec. 17, chap. 32, Comp. Stats., limit the right of recovery to those who suffer from the act com-

- plained of, and exclude mere volunteers who have no interest in the result of the suit. *Id.*.....581-2
3. Where a debtor, who has asked an extension of time from his creditors, conveys a stock of goods constituting his entire property, and the purchaser gives a note as the principal part of the payment, and afterwards, evidently to prevent garnishment by the creditors, trades land to the debtor for the note, such purchaser is not a *bona fide* one. *Id.*.....578-81
4. Where a party applies to a wholesale house for credit for a firm, representing that it is composed of his sons and that he "stands behind them," and goods are shipped accordingly, but are received by a newly formed partnership of the same name as the one represented, and composed of the wife and daughter of the applicant for credit, the latter not being a partner in any of the firms, such transfer of the goods from the control of the applicant and his sons is a disposition of the same with intent to defraud creditors. *Kirkendall v. Shorey*645-6

Garnishment. See FRAUDULENT CONVEYANCES, 3.

General Denial.

As an answer, puts in issue allegations of petition. Under such issue, affirmative proof in favor of defendant is inadmissible, and an instruction admitting it is erroneous. *Griffith v. Woolworth* 720

Guaranty. See INDORSEMENT. NOVATION.

Heating Apparatus.

Where a contractor agrees with the owner of a building to place therein pipes, radiators, etc., the owner to furnish the boiler, and the latter is unfit for the use intended, the defect cannot be charged to the contractor, who is entitled to recover for the labor and material where the same conform to the contract. *Knutson v. Hansen* 600

Highways. See ROADS.

Homesteads.

1. Law creating is remedial and should be liberally construed. *Mitchelson v. Smith*..... 586
2. No burdens will be imposed on, not created by act of parties or by operation of law. *Id.*
3. Hence, where a husband and wife mortgage their homestead and other real estate, and afterwards the wife alone mortgages the same property less the homestead, to another party, the first mortgagee will not be required to exhaust the funds derived from a sale of the homestead before re-

sorting to the land covered by the second mortgage, in order that both the debts could be paid. *Id.*

4. Constituted by the two acts of residence and selection. *Galligher v. Smiley*.....194-5
5. Law applicable to a contract with reference to, is law in force when contract is formed. *Id.*..... 194
6. A homestead of 80 acres, which under the law of 1867 is exempt from sale for the payment of debts contracted prior to the repeal of said law, cannot be reduced to 20 acres (the limits prescribed for an exempt city lot, by a later act,) by reason of the incorporation of such 80 acre tract within city boundaries, under an act of the legislature, even though such tract is greatly enhanced in value, and judgment against the owner cannot otherwise be enforced. *Id.*.....193-6

Husband and Wife. See DIVORCE. MARSHALLING ASSETS. MECHANICS' LIENS, 9.

In an action on a note signed jointly by, where the issue was whether the wife was the principal debtor or a mere surety, and it was charged and not denied that the husband had no means of his own to pay such debt, and there was testimony that the wife had, a verdict against the latter was sustained. *Bowen v. Foss*.....375-6

Illegal Fees. See JOINDER OF CAUSES. JUSTICES OF THE PEACE, 3.

Indians.

1. Are *prima facie* non-voters. *State, ex rel. Fair, v. Frasier*.. 465
2. Must be shown to have been born within the limits of the United States, and to have received allotments of land from the government, pursuant to the act of congress of 1887 (known as the Dawes bill), or equivalent authority, in order to be entitled to the rights of citizenship and suffrage. *Id.*..... 466
3. The fact that an original allotment has been made to certain Indians, but has been canceled and withdrawn for the purpose of making a new allotment, which has not been completed, is not sufficient to entitle such Indians, even if natives, to vote under the act of 1887. *Id.*..... 460-465, 466

Indorsement. See ALTERATION, 2.

- A guaranty of payment written on the back of a promissory note, and signed by the payee, constitutes. *Helmer v. Commercial Bank*..... 478
- Weits v. Wolfe*..... 501

- Information.** See LARCENY, 3. RELIGIOUS SOCIETIES, 1-3.
 Confers no jurisdiction upon district court, when filed by county attorney against an accused who had not been given a preliminary examination, save in the excepted cases provided for in sec. 585 of the Criminal Code. *White v. State*.....341, 345
- Injunction.** See ELECTIONS, 4. RESTRAINING ORDER. WATERS.
- Injuries to Person.** See CITIES, 4-7. PERSONAL INJURIES. VILLAGES.
- Innkeepers.**
 Sleeping car companies subject to the same liabilities as, where they render similar service. *Pullman Palace Car Co. v. Lowe*..... 249
- Instructions.** See EMINENT DOMAIN, 7. JOINDER OF CAUSES. MALICIOUS PROSECUTION. REVIEW, 13.
1. May be oral, where parties so stipulate. *Burns v. City of Fairmont*..... 873
 2. Should be refused when not predicated upon the testimony. *City of Lincoln v. Smith*..... 782
 3. Must be construed as a whole, and it is sufficient if, as such, they properly state the law. *Id.*.....763, 782
 4. Properly refused when substantially embodied in those already given. *Id.*
 5. Refusal to give, is error, where there is any evidence, though conflicting, to support an issue presented thereby. *Hancock v. Stout*.....306-7
 6. When given at the request of a party, or where he takes no exception thereto, cannot be assigned by him as error. *F., E. & M. V. R. Co. v. Meeker*..... 94
 7. When not objected or excepted to at trial, objections will not be considered in supreme court on review. *Gibbons v. Sherwin*..... 163
 8. In action for damages for right of way taken by a railroad company, examined and discussed. *B. & M. R. Co. v. White*.....169-71
 9. In action to recover value of certain services, examined and held applicable to the evidence. *Smiley v. Anderson*...102-3
- Insurance.**
1. Policy is to be so construed, if possible, as to carry its provisions into effect. *Springfield Ins. Co. v. McLimans*... 850
 2. Forfeitures are not favored in law, and the rule applies to insurance policies. *Id.*

3. Where a policy provides that it shall be void if the insured building is vacated, a substantial compliance only is required, and a mere temporary absence will not avoid the policy. *Id.*.....850-1
 4. Right of action on a fire insurance policy made in Iowa, the statutes of which state provide in what counties action may be brought thereon, is not limited to that state, as the action is transitory in its nature and may be brought wherever service can be had on the company. *Ins. Co. of N. A. v. McLimans*..... 657
 5. Under sec. 55 of the Code, action may be brought where the cause of action or some part thereof arose, although the company has no agent in that county. *Id.*
 6. Where one of the defenses to an action on the policy was that the building insured was used for unlawful purposes, and the testimony tended to show that the company's agent resided near the property and knew of the facts, while plaintiffs lived in another state, a verdict for the latter was not disturbed. *Id.*..... 658
Springfield Ins. Co. v. McLimans..... 851
 7. Service of notice and proof of loss on a general agent of the company is service on the latter. *Ins. Co. of N. A. v. McLimans*.....657-8
 8. The company should adjust and pay its losses promptly, unless there are just reasons for refusing, and not wait for reasons why it should pay, to be advanced by the insured. *Id.*..... 659
 9. An agreement by a duly authorized insurance agent, to deduct the premium of a newly issued policy out of money then in his possession belonging to the insured, and apply it to the payment of such premium, is a receipt of the latter and binds the company. *Phoenix Ins. Co. v. Meier*..... 133
 10. Where the policy after being given to the insured is returned to the agent to be kept in his safe, the delivery is complete though it remains in the safe until after loss. *Id.*
 11. In such case, a denial of the contract and of all liabilities thereunder, by the insurance company, is a waiver of the right to insist upon failure of proof of loss. *Id.*
- Interest.** See BANKS, 3, 4.
1. An agreed rate, legal at the date of the contract, continues until payment, though the legal rate has subsequently been reduced. *Allendorph v. Ogden*..... 210
 2. May be stipulated for and collected on coupon notes given for the payment of annual interest on a loan, providing the

amount of interest on both coupons and principal does not exceed the maximum legal rate. *Murtagh v. Thompson*.. 359

3. Where a decree, entered June 16, 1887, requires plaintiffs to pay into court a certain sum of money with interest for one year prior to March 12, 1886, which amount they paid August 15, 1887, interest cannot be required up to the latter date, from March 12, 1886. *Cobby v. Knapp*..... 160
4. In such case, defendant, having paid certain sums as interest on school land, and which accrued to plaintiff's benefit, is entitled to repayment of the same with interest from date of payment. *Id*.....158, 161
5. Where a verdict for damages for right of way taken by a railway company exceeds an award of commissioners, interest should be computed on the amount of the verdict from the date of condemnation. *B. & M. E. Co. v. White*.. 174
6. Where an instruction to so compute interest is withheld at the request of counsel for the company, who agreed that if the verdict exceeded the award the court should enter judgment for such interest, a judgment to that effect, though irregular, is error without prejudice. *Id* 174

Interstate Commerce. See TELEGRAPH COMPANIES, 2.

Intoxicating Liquors. See LIQUORS.

Joinder of Causes.

Where, in an action to recover from a justice of the peace, the penalty for taking illegal fees for preparing and certifying to certain transcripts, the testimony showed that eight of the transcripts were demanded at one time, received together, and paid for in one sum, an instruction in effect directing the jury to find that there were eight separate causes of action, properly refused. *Phoenix Ins. Co. v. Bohman* 254

Judgments. See DECREE. DEFAULT. ELECTIONS, 3. INTEREST, 3. STAY OF EXECUTION.

1. On pleadings. *Irish v. Pheby* 231
2. Cannot be rendered unless issues have been decided either by a finding of the court or a verdict of a jury. *Foster v. Devinney* 420-2
4. District court has power, under subdiv. 3, sec. 602 of Code, to correct, at a subsequent term, errors or defects in the record of its judgments, occurring through mistake or neglect of its clerk, so as to make the entry correspond with the judgment as rendered. *Brownlee v. Davidson* ... 789
5. Notice of an application for such correction must be served on the opposite party, but in the absence of a showing to

the contrary, notice will be presumed to have been given.
Id.

6. Error cannot be predicated on the failure of district court to render a deficiency judgment until it has been requested to do so and refused. *Id.*
7. While a cross-petition to foreclose a mortgage should state whether or not there have been proceedings at law to recover the debt secured thereby, failure to so state does not constitute any of the grounds mentioned in sec. 602 of the Code, upon which alone the district court may vacate or modify its judgments after term. *Carlou v. Aultman* 675

Judicial Sales.

1. Publication on March 16 and April 13 and in every intermediate issue of a newspaper is sufficient notice of. *Carlou v. Aultman*..... 676
2. Set aside where it was shown that the sheriff in charge stated that he had been told by the county attorney that he could not accept the bid of a certain judgment creditor, on the ground that it was the latter's land which was being sold; and the land netted much less at the sale than its value, and less than the creditor would have bid but for such statement. *Aldrich v. Lewis*505-6
3. In 1880 a wife obtained a divorce and also a decree for the conveyance of certain real estate from her husband, which latter was afterwards vacated and an order made that the husband pay her \$1,500. Soon after this order the husband conveyed the land to another party, but the wife obtained a decree, upon constructive service and without appearance by the grantee, declaring such conveyance fraudulent. In 1883, after the act relating to alimony took effect, an execution was issued and the land sold to satisfy the decree for alimony. *Held*, That the purchaser at such sale acquired the title of the husband, and that the decree declaring the conveyance fraudulent was valid until set aside. *Beno v. Hale* 652
4. While purchase at, by an appraiser for the same, is void as against judgment creditors and their grantees, third parties who have no interest in the subject-matter cannot object. *Id.*

Jurisdiction. See ACTIONS. APPEAL, 1, 2. APPEARANCE INFORMATION. NOTICE, 3. QUO WARRANTO, 2. SUPREME COURT.

District court has, and justice of the peace has not, in an action of trespass against a railroad company for unlawfully

building its line across plaintiff's land, where the company pleaded a previous condemnation of right of way, thus raising the issue of title to the land. *E. F. E. Co. v. Plak*, 402

Jurors. See VERDICT, 4.

May separate by agreement of parties, after the verdict has been agreed upon and sealed, though not returned, if they afterwards come into court and report the same. *Rogers v. Sample*..... 144

Justices of the Peace. See APPEAL, 4. ELECTIONS, 5-8.

JOINDER OF CAUSES. JURISDICTION. MANDAMUS.

MISTAKE, 2.

1. Cities of the first class are entitled to three, one to be elected from each of the three districts. *State, ex rel. East-erday, v. Howe*..... 698
2. The provisions of sec. 7, ch. 26, Comp. Stats. as amended in 1889, modify sec. 9, art. 2, ch. 14, of the same and apply to cities of the second class in counties having town-ship organization, thus providing for two justices of the peace in each ward thereof; and votes cast in all wards of such a city for a candidate for justice of the peace, amount- ing in the aggregate to more than those for any of the ward candidates, but not sufficient in any ward to elect, will not entitle him to the office. *State, ex rel. McKinney, v. Partridge*.....755-6
3. Liable to the full penalty of the law for taking illegal fees, yet the statute, being highly penal in its nature, will not be extended by implication or construction. *Phanis Ins. Co. v. Bohman*..... 264

Landlord and Tenant. See LEASE. LIENS.

Under an agreement that the rent shall be a specified number of bushels of corn for each acre planted, but containing no provision that such corn shall come out of the tenant's crop, the landlord has no lien upon corn raised on the leased premises, and he cannot maintain replevin for any portion of the same. *Snell v. Ricketts*..... 617

Larceny. See CRIMINAL LAW.

1. In a prosecution for, witnesses testifying as to the value of the property stolen, must show that they possess knowl- edge of such value. *Brooks v. State*..... 394
2. Where ready-made clothing, worn on Sundays for about seven months, has been stolen, and the owner cannot testify as to its actual value, he will not be permitted to state its real value to him at the time of the larceny, even though such testimony might be admissible where the clothes had a peculiar value from some specific cause. *Id.*.....393-3

2. In an information for, of property belonging to a bank, an amendment showing that the bank is a corporation organized under the laws of the state is unnecessary, and therefore works no prejudice to the accused, though allowed after jury is sworn. *Brailwaite v. State*.....836
4. On the trial, in such case, necessary to prove only the *de facto* existence of the corporation, and its ownership of the stolen property; articles of association or charter need not be introduced. *Id.*..... 832, 836

Leading Questions.

1. Testimony containing questions objected to as leading, set out and discussed. *Obernulte v. Edgar*.....73-77
2. Discretionary with trial judge to determine whether or not questions are objectionable as leading, and his ruling will not be reversed for error, unless there has been an abuse of discretion. *Id.*.....70, 78

Lease. See LIENS.

Where a lease of certain premises was renewed at various times, and on the first renewal the lessee was given an option to purchase, to "continue during the lease," held, that the renewals effected a continued lease, during any period of which the lessee might avail himself of the option, and enforce a conveyance. *Schields v. Horbach*.....368-371

Licenses. See LIQUORS.

Money received for liquor licenses by a village lying partly in three school districts should be distributed equally among the latter, and not according to the number of scholars or extent of territory, and *mandamus* lies to compel such distribution. *State, ex rel. Primmer, v. Brodboll*.. 258

Liens. See LANDLORD AND TENANT. MECHANICS' LIENS.

Where a lease of farm lands provides that the rent shall be a lien on the crop, but has not been recorded, the lessor's lien is inferior to that of one who has taken a chattel mortgage on the crop without notice of the lease. *Gandy v. Dewey*..... 178

Limitation of Actions. See NEGOTIABLE INSTRUMENTS, 2.

1. An action on an account for threshing grain in 1879, 1881, and 1882, brought in 1884, is barred as to the item for 1879. *Reeves v. Nye*..... 572
2. So also is a right of action, which defendant pleads as a set off, arising from the fact that defendant had, in 1879, loaned plaintiff a boar which the latter promised to return shortly, but failed to, and afterwards sold the animal. *Id.*..... 574

2. Where, soon after the conveyance of real estate to the wife of a debtor, he becomes insolvent, and the creditor has knowledge of such conveyance and insolvency, of the occupation and improvement of the real estate by the debtor, and other facts which, if followed up, would lead to a discovery of the fraud, the statute begins to run under sec. 12 of the Civil Code, and the creditor's right to subject the property to the payment of the debt on account of the fraud becomes barred in four years. *Wright v. Davis*.....483-4

Liquors. See LICENSES.

- Where a party is convicted on seven counts of an information for selling without license, court cannot reduce the fine below \$700, as sec. 11, ch. 50, Comp. Stats., makes \$100 the minimum fine for each offense. *State v. Faber*..... 805

Lost Instruments. See NEGOTIABLE INSTRUMENTS, 1.

Machinery. See HEATING APPARATUS.

Malicious Prosecution.

1. Evidence examined and found to sustain the verdict that the criminal prosecution had been instituted maliciously and without probable cause. *Tucker v. Cannon*..... 196
2. Instruction as to probable cause properly refused where one portion of the same had been substantially given in a previous instruction, and the other portion omitted the elements of fraud. *Id.*..... 200, 201
3. In an action to recover damages for, where the testimony tended to show that defendant had instituted a criminal prosecution against plaintiff for the sole purpose of getting possession of certain drafts held by plaintiff as the proceeds of a sale of cattle, which the two parties had owned jointly and after the drafts had been obtained, the criminal charge was allowed to lapse, evidently for want of proof, *held*, that the prosecution was without probable cause, and that a verdict for defendant would be set aside as contrary to the evidence. *Hlatt v. Kinkaid*..... 739

Mandamus. See ELECTIONS, 4. LICENSES. RESTRAINING ORDER, 3. SCHOOLS, 3.

- Will not lie to compel a justice of the peace to require, as a condition of allowing a stay of execution of a judgment rendered by him, that the judgment debtor sign a bond; sec. 1049 of the Code requires no more than an undertaking signed by one or more sureties alone. *State, ex rel. Stange, v. Cochran*..... 801

Married Women. See HUSBAND AND WIFE.

- Must be *bona fide* purchasers of property acquired from hus-

band in order to protect such property from latter's creditors. *Howell v. Hathaway* 809

Marshalling Assets.

Where a husband and wife mortgage their homestead and other real estate, and afterwards the wife alone mortgages the same property, less the homestead, to another party, the first mortgagee will not be required to exhaust the funds derived from a sale of the homestead before resorting to the land covered by the second mortgage in order that both debts could be paid; as securities will not be marshalled where the effect is to impose on the homestead an additional liability to which both husband and wife have not duly assented. *Mitchelson v. Smith*..... 596

Master and Servant. See FELLOW-SERVANTS.

An instruction that it was the duty of a master employing a servant in the use of machinery to "use ordinary and reasonable care and judgment" to provide suitable and safe machinery, is not rendered erroneous by the use of the word "judgment," it being used synonymously with "prudence." *Joseph Garneau Cracker Co. v. Palmer*..... 311

Material Men. See MECHANICS' LIENS.

Mechanics' Liens. See PLEADING, 4.

1. Law of, is remedial and should be liberally construed. *Knutzen v. Hanson*..... 595
2. There being ample evidence to sustain the finding of the jury that the materials had not been delivered within sixty days prior to the date of filing the claim, a decree that plaintiffs were not entitled to a lien was affirmed. *Howell v. Wise*761-2
3. Sec. 2, ch. 54, Comp. Stats., affords a lien upon a railroad to all persons who perform labor or furnish material in its construction. *Stewart-Chute Lumber Co. v. M. P. E. Co.*... 39
4. Building materials sold by lumber dealers to a subcontractor, engaged in building a railroad, and delivered to him for use in erecting boarding shanties and stables for men and animals employed by him, are "furnished in the construction" of the railroad within the meaning of the statute. *Id*39, 45-51
5. In such case the lien attaches at delivery, and it is not necessary to allege or prove actual use of the material for the purpose intended. *Id.*
6. Where notes are given for labor and material furnished in placing a steam heating plant in a house, copies of the notes duly filed in the proper office, accompanied by an

affidavit setting forth that the debt was incurred under a contract with the owner of the building, that the notes are unpaid, etc., are sufficient, though the affidavit and proceedings are informal, to establish a lien, and charge subsequent purchasers with notice. *Knutson v. Hanson*, 585-6

7. It is proper, but not imperatively required in such case, to attach an itemized statement to the copies of the notes. *Id.* 595

8. Where there is some evidence of the delivery at the site of the building of all the material entering into the construction of a church building, and no evidence to the contrary, and no suggestion that the material for the superstructure was furnished by any one but plaintiff, and it appears that the trustees paid off the contractors, and the latter absconded before the building was finished, plaintiff is entitled to a judgment establishing and foreclosing his mechanic's lien. *Irisht v. Pheby*, 238

9. Where building material is furnished to a husband and used in erecting a house for himself and wife, on a lot to which the legal title is in the latter, but there is no proof as to whether it was a gift from the husband or was paid for with her own means, and the testimony shows that she acquiesced in the contract for materials, the property is subject to the material-man's lien. *Howell v. Hathaway*, 808-10

10. Where a vendee of real estate who paid one-fourth of the purchase price down, verbally agreeing to pay the remainder in ninety days, but, failing to do so, had, before the expiration of the ninety days, erected a dwelling-house on the land, and mechanics and material-men sought to foreclose liens on the same, *held*, that the property should be sold as upon execution, and the proceeds applied to the payment (1) of the amount due on the contract of purchase, (2) of the liens, the remainder, if any, to the purchaser; but the lienholders to be paid *pro rata*, if there was not sufficient, after paying the purchase price, to satisfy the liens. *Irisht v. Lundin*, 84, 90

Messages. See TELEGRAPH COMPANIES.

Mistake. See REINSTATEMENT.

1. Occupation under, constitutes adverse possession. *Obernatie v. Edgar*, 70, 83
2. A clerk's overcomputation of the number of words in certain transcripts prepared, and certified to by a justice of the peace, will not excuse the latter for charging more than the law allows for such service. *Phoenix Ins. Co. v. Bohman*, 253

Mortgages. See FORECLOSURE. MARSHALLING ASSETS.
NEGOTIABLE INSTRUMENTS, 2. VENDOR AND VEN-
DEE, 4.

Municipal Corporations. See CITIES. VILLAGES.

National Banks. See BANKS, 3, 4. PLEADING, 10-12.

Naturalization. See INDIANS.

Negligence. See CITIES, 4-7. CONTRIBUTORY NEGLIGENCE.
PERSONAL INJURIES. RAILROADS. SLEEPING CAR
COMPANIES. VILLAGES.

1. Evidence examined and found to establish negligence of locomotive engineer in causing injuries to employe of one who had an independent contract with the railroad company for filling the tenders of its engines with coal from coal pockets in its sheds. *U. P. R. Co. v. Billeter*.....430-1
2. Evidence found not to show contributory negligence on the part of such employe. *Id.*..... 430
3. Such engineer and employe are not fellow-servants within the rule exempting the railroad company from liability. *Id.*.....427-9

Negotiable Instruments. See ALTERATION, 2. BONA FIDE
HOLDER. HUSBAND AND WIFE. INDORSEMENT.

1. Where certain notes were sent to a bank for collection, presented to the maker but not paid, and the bank officers testified that to the best of their knowledge the notes were returned by mail to the owner, and that they had no dealings with a third party who claimed to have purchased the notes from the bank, *held*, that as the owner never received the notes as sent from the bank, and as they were not again presented for collection, they would be presumed to be lost instruments and the owner could recover on them as such. *Allendorph v. Ogden*..... 210
2. Where a real estate mortgage secures five notes, each dated February 29, 1876, payable in one, two, three, four, and five years, and the summons in an action to foreclose the mortgage is dated February 9, 1898, only one of the notes is barred, as they continue to be evidence of the debt for ten years after maturity. *Cheney v. Campbell*..... 378
3. Where notes given for grossly usurious interest are transferred to a *bona fide* holder for one-half their face value, the purchaser claiming that the security might be inadequate, the same rule will be applied as where the original consideration was wholly fraudulent, and the purchaser may recover only the amount actually paid, with legal interest. *Id.*..... 379

New Trial. See **BILLS OF EXCEPTIONS, 2.**

1. Oral motions for, insufficient. *Phoenix Ins. Co. v. Read-inger* 590
2. Rules applicable to motions for, discussed. *Id.*.....589-90
3. Motion for, must specify grounds sufficient to authorize. *Id.*.....589-90
4. Motion for, necessary in an equity cause taken on error to the supreme court, as well as in an action at law. *Carlou v. Aultman*..... 675
5. The defense to an action for labor performed in erecting a party-wall being predicated on the alleged fact that plaintiff had placed a footing of but 14 inches of concrete under the wall, instead of 20 inches as contracted for, and defendant having marshalled his evidence to prove such fact, a new trial will not be granted, upon a showing that defendant found after verdict that the concrete was but 12½ or 13 inches thick. *Livsey v. Festner*..... 340

Notes and Bills. See **NEGOTIABLE INSTRUMENTS.****Notice.** See **INSURANCE, 6. JUDGMENTS, 5. JUDICIAL SALES,**

1. **MECHANICS' LIENS, 6. REAL ESTATE, 3. SALE,**
4. **SCHOOLS, 1.**

1. Need not be given to other parties to the action when the defendant files his answer and cross-petition within the time fixed by law. *Carlou v. Aultman*..... 675
2. Actual, not necessary to render a city liable for a defect in a sidewalk; facts and circumstances from which such defect might have been inferred or ought to have been known, sufficient. *City of Lincoln v. Smith*.....772, 774
3. When service of, is made by publication, and no appearance is entered by defendant, jurisdiction will be acquired for no other purpose than that of granting the relief asked in the petition and of which notice was given. *Vorce v. Page*..... 300

Novation.

Where the parties on both sides of a contract for the sale of real estate assigned their respective interests in the same, and one of them guaranteed payment, was subsequently sued for amounts due, and set up as a defense a novation by which plaintiff agreed to look for payment to the holders of the assigned interest of the other parties to the contract, *Acid*, that even had such holders made payments to plaintiff's collector, defendant would not have been released from his guaranty, and that the evidence in general did not establish novation. *Mercer v. Miles*..... 215

Nuisances. See **WATERS.**

Officers. See **CITIES, 1. ELECTIONS. SPECIFIC OFFICERS. TAXES.**

Onus Probandi.

Upon one who has replevied certain property taken in execution, to establish the fact that the judgments under which the executions were issued had been paid as claimed, where the case turns upon the question of such payment. *German v. Boslough*.....33, 39

Option. See **LEASE. SALE, 4.**

Where a party hires a boar under a contract to return it within a short time, but fails to do so and sells the animal, the owner may elect to bring his action either in tort or on the contract. *Reeves v. Nye*..... 574

Oral Agreements. See **STIPULATIONS.**

Ordinances. See **RAILROADS, 3, 4. .**

Parties. See **PARTNERSHIP, 1.**

1. A petition in which plaintiffs are described as "*Weiss & Mall Co.*, a partnership doing business in the state of Iowa," is defective in not setting out the names of the parties. *Weiss & Mall Co. v. Davey*..... 508
2. Such defect may be taken advantage of by a motion to dismiss, and need not be by a plea in abatement. *Id.*
3. Where a member of a late partnership has assumed the firm debts, in consideration of which he holds a chattel mortgage on the other partner's property, but releases such mortgage on an agreement by an outside party to assume the firm debts, such member may, under sec. 32 of the Code, maintain an action on such agreement. *Ley v. Miller*..... 835

Partition.

Heir or devisee cannot, unless he give bond, maintain action for, or for distribution, until debts and expenses against estate have been paid or provided for. *Beckeway v. Wallemath*493-4

Partnership. See **FRAUDULENT CONVEYANCES, 3. MALICIOUS PROSECUTION, 3. PARTIES.**

1. An agreement by only one of two partners to share in a contract for the purchase of cattle with a third party, does not make the latter an indispensable party to an action by the partners for the non-delivery of the cattle. *Filley v. Walker*.....524-5
2. Where in action to dissolve, and for an accounting, a reference was made, and the referee found in plaintiff's favor

for a sum greater than that claimed in the petition, but the judgment was reduced to that sum, and exceptions to the referee's report overruled, the judgment was affirmed.

Kettler v. Kettler..... 403

Personal Injuries. See CITIES, 4-7. EVIDENCE, 9. FELLOW-SERVANTS. NEGLIGENCE. VILLAGES.

1. Instructions in action for, against a city, discussed. *City of Lincoln v. Smith*.....776-85
2. Instructions in action for damages for, examined and approved, and evidence found to sustain the verdict. *Stevens v. Howe*.....554-66
3. When alleged to have been received by reason of the defective appliances of a locomotive, question of such defect is one for the jury. *B. & M. E. Co. v. Wallace*..... 185
4. Evidence examined and found not prejudicial and that the court did not err in refusing to strike it out. *Id.*..... 186
5. Instructions in action for damages from, examined and approved. *Id.*.....187-8

Pleading. See ANSWER. ASSUMPSIT, 1. GENERAL DENIAL. NOTICE, 1. PARTIES, 1, 2. TENDER.

1. Not admissible as evidence. *Johnson v. First National Bank*..... 796
2. A denial of the facts "as alleged in said petition" is not a denial of the allegations. *Phoenix Ins. Co. v. Meier*... 130
3. All new matters constituting an entire or partial defense, to a cause of action, must be pleaded. *Mordhorst v. Neb. Telephone Co.*.....610, 611
4. Where parties in their pleadings claim a lien superior to the rights of a purchaser, alleging that he took subject to their claim, but fail to deny that he was a *bona fide* purchaser, there is no admission that he was such. *Knutsen v. Hanson*..... 596
5. Where plaintiff alleges in his petition the facts necessary to entitle him to a judgment, and none of such facts are denied, and no set-off, counter-claim, etc., is alleged or pleaded in avoidance, he is entitled to a judgment on the pleadings. *Irish v. Pheby*.....231, 238
6. Where the only question is the amount of the recovery, new pleadings need not be filed in the district court, in an appeal from an award by commissioners of damages for right of way; but if filed, such pleadings do not necessarily prejudice either party. *F., E. & M. V. E. Co. v. Meeker*..... 97
7. Where a petition fails to state a material fact, but a de-

murrer thereto is overruled, and defendant answers, after which a reply is filed setting up facts which the petition should have contained, and which would have made it sufficient, and trial is had and judgment rendered on the issues, defendant cannot then rely upon his demurrer.

Beckway v. Waltemath..... 494

8. Where no reply is filed below, a certificate of the trial judge, that the new matter set up in the answer was treated as denied by a reply, will not be considered by the supreme court, as it is neither an amendment of the record nor a supplement to the bill of exceptions. *Ley v. Miller*, 824
9. But if, upon examination, it is found that no new matter is set up requiring a reply, the rights of the parties will be ascertained from the record as it stands. *Id.*.....824-5
10. In a petition in an action against a national bank for taking usury, the words "so as aforesaid paid by the plaintiff to the defendant, and by the defendant knowingly contracted for and received from the plaintiff," are neither redundant, scandalous, nor irrelevant matter, within the meaning of sec. 125 of the Code. *Schuyler National Bank v. Bollong* 691
11. A petition containing several causes of action not separately stated and numbered will not be sustained, but is not for that reason void and may be amended. *Id.*..... 692
12. Upon such amendment being made, the identity of the causes of action preserved, and plaintiff's claim left substantially unchanged, no new summons need be issued or served, and the action will be regarded as commenced at the date of the issuance of the summons. *Id.*..... 694

Pollution. See WATERS.

Possession.

Equities of one in. *Buchanan v. Wise* 312

Practice. See APPEAL. BILLS OF EXCEPTIONS. CONTINUANCE. DISMISSAL. EVIDENCE. NEW TRIALS. PLEADING. STIPULATIONS. VERDICT.

Practice in Supreme Court. See REVIEW. SUPREME COURT.

Premium. See INSURANCE.

Prescription.

1. Public acquire an easement in a road by, where such road has been traveled for more than ten years, and after the lapse of that period courts will not examine into the validity of the proceedings by which the road was located. *City of Beatrice v. Black* 289
2. The fact that a large portion of the travel over a road, in-

stead of passing its entire length turns off over a shorter route, will not, if there has not been entire non-user, prevent the public from acquiring an easement in the portion not generally used. *Id.*..... 270

Presumptions. See JUDGMENTS, 5.

1. Are in favor of the original proceedings for locating a road which has been used by the public for more than ten years, and courts will not examine the validity of such proceedings after the lapse of such period. *City of Beatrice v. Black* 269
2. Are in favor of the regularity of proceedings in the district court, and where two depositions have been omitted from the bill of exceptions brought to the supreme court, it will be presumed that the verdict below was supported by the evidence. *Joseph Garneau Cracker Co. v. Palmer* ... 210

Principal and Agent. See INSURANCE, 5, 6, 8-11. REAL ESTATE AGENTS. SALE, 2, 5.

Probable Cause. See MALICIOUS PROSECUTION.

Promissory Notes. See NEGOTIABLE INSTRUMENTS.

Question of Fact. See CONTRACT, 2. CONTRIBUTORY NEGLIGENCE. EMINENT DOMAIN, 4. RAILROADS, 2, 4. SALE, 2.

Quieting Title. See ACTION QUIA TIMET.

Quo Warranto.

1. May be employed to determine conflicting claims to the office of county attorney, the statutory remedy by contest being cumulative, not exclusive. *State, ex rel. Fair, v. Frasier* 457
2. Supreme court has original jurisdiction in, and writ issued by it may be legally served in any county in the state. *Id.*..... 455-6
3. When, if brought in supreme court, the attorney general, or, if in district court, the county attorney, shall refuse to institute, complaining party may do so. *Id.*..... 454

Railroads. See EMINENT DOMAIN. MECHANICS' LIENS, 3-5. NEGLIGENCE. PERSONAL INJURIES, 3-5. SLEEPING CAR COMPANIES.

1. Liable for killing horses which, the evidence showed, had strayed upon the track through an open gate in the fence built by the company alongside; were killed in the night by a train running at a high rate of speed; and had run rapidly in front of the engine for some distance to escape it. *M. P. R. Co. v. Vandeventer*..... 117

2. In such case the question of negligence was properly submitted to the jury. *Id.*..... 118
3. In an action against a railroad company for killing a cow within city limits, where the killing and value of the cow were admitted, and the only question was whether there was negligence on the part of the company's employes in the killing, and on the part of plaintiff in permitting the cow to run at large contrary to a city ordinance, the latter, as well as one limiting the speed of trains within the city, were admissible in evidence, but were not, even if violated, conclusive proof of negligence. *C., B. & Q. E. Co. v. Richardson*.....122-3
4. In such case, it was not error to instruct the jury that speed beyond the ordinance limit would, if it were the cause of the accident, be negligence, and that permitting the cow to run at large would not of itself be contributory, but would be a fact for the jury to consider. *Id.*...123-4

Rape.

In a prosecution for an assault with intent to commit, evidence that defendant, while he intended to have sexual intercourse with the prosecutrix, expected to accomplish his purpose by procuring her consent, and failing in that, desisted, is insufficient; he must have intended to use whatever force was necessary to overcome her resistance.

Skinner v. State..... 821

Ratification.

Franse v. Armbruster..... 470

Real Estate. See EXPERT EVIDENCE. FORCIBLE ENTRY AND DETAINER. FOREIGN CORPORATIONS. LEASE. MECHANICS' LIENS, 9. PRESCRIPTION. VENDOR AND VENDEE, 4.

1. Evidence consisting of correspondence between the parties, found to establish a contract for sale of. *Adams v. Thompson*.....58-65
2. Where defendant owned but one tract of land in the subdivision of a city, a mere reference to it in the correspondence was sufficient to admit parol evidence as to description. *Id.*..... 65
3. Defendant having purchased from the grantor of plaintiff, with full knowledge of the latter's purchase and rights thereunder, took subject to such purchase. *Id.*.....54, 68-9

Real Estate Agents. See SALE, 2, 5.

1. Contract for employment, by land-owner, need not be in writing. *Griffith v. Woolworth*..... 717

2. In action upon such contract to recover commissions, evidence examined and found to show that plaintiff's agency had not terminated at the time of the sale in question; that he had complied with the terms and was entitled to recover. *Id.*..... 720-1

Receivers.

1. Supreme court has jurisdiction to appoint, for banks, in a proper case. *State v. Commercial Bank*..... 683
2. Application for appointment of, set out and held sufficient. *Id.*..... 677-82

Referees. See PARTNERSHIP, 2.

Reinstatement.

Where the evidence showed that plaintiffs' attorneys had reason to rely on an agreement for continuance, and through misunderstanding no appearance was made at the trial and the case dismissed, *held*, that a motion to reinstate should have been sustained. *Brusa v. Sandwich Mfg. Co.*..... 831-2

Religious Societies.

1. An information charging that certain parties at times and places stated, did, "willfully and maliciously, and unlawfully, interrupt, molest, and disturb a religious society, to-wit, 'The Welsh Presbyterian church,' and the members thereof, while said members were met to perform the duties enjoined upon them and appertaining to them as members," etc., is sufficient to sustain a conviction. *Jones v. State*..... 497
2. The general rule, however, is that the manner of the disturbance, as by talking, laughing, swearing, etc., should be alleged. *Id.*
3. Where the information charged that the accused were not members, but it was proven that they had been such, and there was no showing that the society had a right to expel them, or that they had been given a trial by the church, or notified to appear, the judgment of the district court convicting them was reversed. *Id.*..... 498-9
4. Where the trustees of a church organization owning a church edifice and the two acres of land on which it was situated, conveyed an undivided half of the property to a faction which had sprung up in the church, the arrangement being that the old and new organizations should occupy the edifice on alternate Sundays, *held*, in an action to cancel the deed given by trustees, on the ground that they were without title, that the compromise being apparently fair, and having been acquiesced in for three years,

would not be disturbed, and as it was impossible to divide the property, a judgment directing a sale and division of proceeds would be sustained. *Wicks v. Nedrow*..... 389

Remedies. See **OPTION.**

Remittitur. See **SHERIFFS, 2. VENDOR AND VENDEE, 2. VERDICT, 6.**

Replevin. See **LANDLORD AND TENANT. ONUS PROBANDI.**

1. Gist of the action is ownership and right to possession. *Graves v. Damrow* 275
2. Where one party agrees to sell trees and shrubbery to another, receiving part payment down, but on the day set refuses to make the delivery, the vendee cannot maintain replevin, though he tender the unpaid purchase price; his remedy being an action for damages. *Id.*..... 274
3. In action of, in justice's or county court, where jury find for plaintiff and assess his damages for wrongful detention of property by defendant, not necessary for it to find whether plaintiff has the right of property or of possession. *Rogers v. Sample*..... 141
4. Where plaintiff filed with the clerk of the district court an affidavit that the suit was against the sheriff and that there was no coroner in the county, and asking the appointment of a third party whom the clerk appointed and who served the summons and executed the order of replevin, making his return under oath; a motion by defendant for leave to make proof of value of property and for a dismissal was properly overruled, as the jurisdiction of the court was not attacked. *Vinnedge v. Nicholai*..... 136-7
5. The affidavit in replevin averring that plaintiff was owner and entitled to the immediate possession was *prima facie* good when attacked by a motion in the nature of a demurrer, though such ownership was alleged to have been based on a chattel mortgage. *Id.*..... 136

Restraining Order.

1. Office is simply to suspend proceedings until parties can be heard, and upon the rendering of a decision the whole force of the order ceases by its own limitation. *State, ex rel. Beecher, v. Wakeley*..... 437
2. Chap. 27, Session Laws of 1889, providing for the execution of a supersedeas bond, upon the dissolution of a temporary injunction, does not apply to a restraining order intended to prevent the commission of an act until the application for a temporary injunction can be heard. *Id.*..... 434-7

3. *Mandamus* will not lie to compel a district judge to fix the amount of such bond, where a temporary injunction is refused, even though a restraining order may have been previously granted. *Id.*

Review. See APPEAL. DEGREE. ERROR PROCEEDINGS. EVIDENCE, 13. INSTRUCTIONS, 7. SUPREME COURT.

1. In a case brought to it on error, supreme court will consider only assignments in motion for a new trial. *Weiss v. Wolfe*..... 502
2. No advantage can be taken of absence from record of the answer, where it appears that the cause was tried below without objection. *Schuster v. Carson*..... 615-16
3. Where the testimony is conflicting, and there is no such preponderance of evidence against the verdict as would justify setting it aside, the court will not do so, though not fully satisfied with it. *Sanders v. Quick*..... 165-6
4. Where a cause is submitted without briefs pointing out objections to instructions, latter will not be examined. *Id.*..... 164
5. Conflicting oral testimony which involves the credibility of witnesses will not ordinarily be reviewed by the supreme court. *Phoenix Ins. Co. v. Readinger*..... 590-1
6. An assignment of error based upon the overruling of objections to twenty-two questions, no ground of objection being suggested in brief or argument, and the errors not being apparent of themselves, was overruled by the supreme court *pro forma*. *Fulley v. Walker*..... 523
7. Where a cause is submitted to the supreme court without brief or oral argument, no error appears in the record, and verdict is not contrary to the evidence, the judgment will be affirmed. *Cornell v. Barnum*..... 862, 865
8. Where the only error assigned was, in effect, that the verdict was against the weight of the evidence, and, while the latter was conflicting, a clear preponderance thereof sustained the verdict, it was affirmed. *Wallace v. Thresher*, 807
9. Where, in action for failure to accept and pay for hogs according to contract, the main question is whether plaintiff was ready and willing to deliver, and the evidence is conflicting, the verdict will not be disturbed. *Dodge v. Kiene*.. 223
10. A judgment of a justice of the peace, affirmed on error to the district court, and thence taken on error to the supreme court, no error appearing from the transcript of the justice, which is the only evidence before the higher courts, will be affirmed as of course. *McKeighan v. Graves*..... 801

11. In a suit to enjoin the pollution of a water-course, *held*, that while the fact of such pollution was a question for the jury, yet as the evidence was clearly against the finding, it was reversed and a decree entered in supreme court accordingly. *Barton v. Union Cattle Co.*.....357-8
12. Where the bill of exceptions shows upon its face that not all the evidence submitted to the trial jury is before the supreme court, the judgment below will not be reversed as being unsupported by the evidence. *Joseph Garneau Cracker Co. v. Palmer*..... 310
13. In such case, where the instructions are complained of, the only question which can be settled with reference to them is whether or not they state the law under any conceivable condition of facts. *Id.*

Revivor. See BASTARDY.

Right of Way. See EMINENT DOMAIN. JURISDICTION.

Roads.

1. Petition for location of, examined, and *held*, that objections thereto were too general and should have pointed out wherein it failed to comply with the statute. *Davis v. Boone County*..... 842
2. In proceedings to reverse the order of a board of commissioners locating, in the district court and thence taken to the supreme court, only the objections made before the commissioners will be considered. *Id.*
3. Filing of claim for damages from location of road over one's land, is a waiver of all objections on account of irregularity in proceedings. *Id.*..... 843
4. When used by the public for more than ten years, will be presumed to have been opened by the regular statutory proceedings upon due notice of a petition for the same. *City of Beatrice v. Black*.....269-70
5. The fact that a portion of the travel over a road, instead of passing its entire length, turns off over a shorter route, will not, if there has not been entire non-user, prevent the public from acquiring an easement in the portion not generally used. *Id.*..... 270

Sale. See FRAUDULENT CONVEYANCES. JUDICIAL SALES.
 REPLEVIN, 2. STOPPAGE IN TRANSITU. VENDOR AND
 VENDER.

1. Contract for, of real estate, not established by the evidence, which consisted of correspondence between the parties. *Adams v. Thompson*.....58-65
2. Where the question was whether authority to sell was

general or restricted to one party, and the testimony was conflicting, it was for the jury to determine. *Gibbons v. Sherwin*..... 153

4. An instrument acknowledging the receipt of part payment on land described therein, and providing for future payments, and, when all should be paid, for the execution of a warranty deed, is an evidence of sale and not a mere option to purchase. *Id.*.....153-5
5. Mis carriage of a notice of sale, required by the vendor as a condition in the contract with the agent who sold the property, does not deprive the latter of his right to recover for services performed. *Id.*..... 157

Schools. See COUNTY SUPERINTENDENT.

1. Changes in school district boundaries cannot be made unless (1) a petition therefor is presented to the county superintendent, (2) the same is in writing, (3) due notice is given of the time and place of hearing. *State, ex rel. McLane, v. Compton*..... 491
2. Where a village lies partly in three school districts, it is not necessary that any of the school houses be situated within the municipality: as matters relating to division, location of school houses, etc., devolve upon the county superintendent. *State, ex rel. Primmer, v. Brodbell*..... 258
3. Money received for liquor licenses by such village should be distributed among the three districts, not in proportion to school population, or extent of territory, but equally, and *mandamus* lies to compel such distribution. *Id.*

Service. See INSURANCE, 7. STIPULATIONS, 1. QUO WARRANTO, 2.

Service by Publication. See NOTICE, 3.

Sheriffs.

1. Bondsmen of, are not liable for the acts of their principal who goes into another state with a warrant for the arrest of a party on a criminal charge, and, by falsely claiming that he has a warrant for the extradition of such party, induces the latter to submit to arrest there; but are liable where the sheriff comes back to his own state with the party and there imprisons him wrongfully. *Kendall v. Aleshire*.....712-13
2. In an action against such bondsmen, evidence as to the condition of plaintiff's family at the time of his arrest, and much other testimony was improperly admitted, and as such testimony was presumed to have largely contributed

to swell the verdict against defendants, which was \$2,500, a remittur of \$2,000 was ordered as a condition of affirm-
ance. *Id.*.....714-15

Sheriffs' Sales. See JUDICIAL SALES.

Sidewalks. See CITIES. VILLAGES.

Slander.

1. Law applicable to, discussed. *Hendrickson v. Sullivan*...332-3
2. The words: "I guess the old bitch can pay her rent now, after having so many men running up here nights," and others of similar import spoken by a landlord of a sub-tenant, are actionable *per se*. *Id.*

Sleeping Car Companies.

When rendering service similar to inn-keepers are subject to the same liabilities, and can be held liable for passenger's wearing apparel placed in the care of a porter and subsequently stolen from the car. *Pullman Palace Car Co. v. Lowe*..... 249

Stare Decisis. See COUNTY BONDS.

Statutes. See ELECTIONS, 7.

When so clearly inconsistent and repugnant that both cannot be followed, the later enactment prevails. *State, ex rel. Easterday, v. Howe*.....637-8

Statute of Limitations. See LIMITATION OF ACTIONS.

Statutes Cited and Construed. See TABLE, *ante*, p. 29.

Stay of Execution. See FORECLOSURE.

1. Undertaking for, on a judgment rendered by a justice of the peace, examined, and found sufficient. *State, ex rel. Stange, v. Cochran*.....799-801
2. Sec. 1049 of the Code does not require the judgment debtor in such case to give a bond; the undertaking of one or more sureties, and which the principal need not sign, is sufficient. *Id.*..... 801

Stipulations. See EMINENT DOMAIN, 7. INSTRUCTIONS, 1.

1. When oral and made out of court in regard to a case (such as waiving summons in error), will not be enforced. *Haylen v. M. P. R. Co.*.....661
2. When oral and made publicly in open court, or when in writing, will be enforced, if within the scope of authority of the parties thereto. *Id.*

Stoppage in Transitu.

1. Right of, exists until goods have come into actual or constructive possession of vendee. *Schuster v. Carson*..... 615

2. Vendor cannot claim unless vendee is shown to be insolvent. *Id.*

3. Attachment of goods while in the warehouse, by a general creditor of the vendee, does not destroy the right of. *Id.*

Suffrage. See ELECTIONS. INDIANS.

Summons. See DEFAULT, 2. NEGOTIABLE INSTRUMENTS, 2.

Where there are two attorneys of record in a cause, service on one is sufficient. *Comstock v. Cole*..... 471

Summons in Error. See STIPULATIONS.

Need only be issued, not served, within a year from date of rendition of judgment below. *Hendrickson v. Sullivan*... 791

Supersedeas. See APPEAL, 3. ELECTIONS, 3. RESTRAINING ORDER, 2, 3.

Supreme Court. See COSTS. EVIDENCE, 13. INSTRUCTIONS,

7. PLEADING, 8, 9. QUO WARRANTO, 2, 3. REVIEW.

Filing of transcript of pleadings and decree in lower court is sufficient to confer jurisdiction upon, and having jurisdiction for one purpose, it exists for all others. *Schuyler v. Hanna*..... 603

Taxes.

When paid to the treasurer of a county to which the county where the taxed property was located was attached for revenue purposes at the date of assessment, but which had been separately organized when the taxes became due, may be recovered back as a payment to a public officer under color of his office, whose authority to collect had ceased. *F., E. & M. V. E. Co. v. Holt Co*.....747-8

Telegraph Companies.

1. Are common carriers of messages. *Kemp v. W. U. Tel. Co.*, 606

2. Under sec. 12, ch. 89a, Comp. Stats., liable for all damages from an incorrect message, by which the sender lost a promised situation, even though such message was transmitted to a point without the state, was unrepeatd, and the printed blanks of the company limit its liability in such cases to the amount received for sending the message. *Id.*.....666-7

Tender.

1. Plea of, in answer admits that the amount tendered is due plaintiff. *Phoenix Ins. Co. v. Readinger* 590

2. Such plea differs from an offer by defendant to allow judgment to be taken against him for a specified sum, in which case it is unnecessary to mention in the answer the amount tendered. *Id.*

Testimony. See EVIDENCE.

- Time.** See **APPEAL**, 4. **ERROR PROCEEDINGS**, 3-5.
 When a summons designates the hour of its return, common,
 not standard time presumed to have been intended, un-
 less otherwise shown. *Searles v. Aterhoff* 669
- Transcripts.** See **BILLS OF EXCEPTIONS**, 1. **JOINDER OF**
CAUSES. MISTAKE, 2. **SUPREME COURT.**
- Trespass.** See **JURISDICTION.**
- Trial.** See **EVIDENCE. LEADING QUESTIONS. NEW TRIAL.**
VERDICT.
- Trusts.** See **BANKS**, 2. **WILLS**, 1.
- Trustees.** See **RELIGIOUS SOCIETIES**, 4.
- Undertaking.** See **STAY OF EXECUTION.**
 As distinguished from bond. *State, ex rel. Stange, v. Cock-*
ran.....800-1
- Unavoidable Casualty.** See **DÉCRET.**
- User.** See **PRESCRIPTION.**
- Usury.** See **BANKS**, 3, 4. **INTEREST**, 1, 2. **NEGOTIABLE IN-**
STRUMENTS, 3.
- Vendor and Vendee.** See **EMINENT DOMAIN. LEASE.**
MECHANICS' LIENS, 10. **SALE. STOPPAGE IN TRAN-**
SITU.
1. Instructions in action for non-delivery of cattle, discussed.
Filley v. Walker513-28
 2. Evidence examined and found to sustain the verdict, ex-
 cept as to \$14 of borrowed money, which defendant was
 ordered to remit as a condition of affirmance. *Id.*..... 529
 3. Evidence in action for damages for false representations
 by one of the parties to a contract for the sale of live
 stock examined and found to sustain the verdict. *Prall*
v. Sawyer..... 530
 4. In an action by a mortgagee's attorney to foreclose, the
 deceased mortgagor's heir was not made a party, and a
 quitclaim deed executed by such heir to the mortgagee
 was not properly recorded. The attorney became the pur-
 chaser at foreclosure sale and conveyed the land to his
 grantee, taking by warranty deed and holding open and
 notorious possession. Meantime other parties received,
 for a portion of the property, a quitclaim deed from the
 heir, the consideration recited being \$50, and in turn con-
 veyed to the plaintiff, who had nothing but the recital in
 his deed to show that he was a *bona fide* purchaser. *Held,*
 That plaintiff was not entitled to redeem from the mort-
 gage as against any of those claiming under the foreclosure
 sale. *Buchanan v. Wise*..... 312

Vendor's Lien. See **MECHANICS' LIENS**, 10. **STOPPAGE IN TRANSITU.**

Venue. See **QUO WARRANTO**, 2.

Verdict. See **SHERIFFS**, 2.

1. Set aside as too small. *Hancock v. Stout*..... 305
2. Court should direct, for defendant where evidence is insufficient to establish plaintiff's case. *Burns v. City of Fairmont*..... 873
3. Failure of clerk to mark date of filing on, will not prevent verdict being introduced in evidence. *Baldridge v. Foust*..... 263
4. Court may send jury back to correct, if insufficient in substance or form. *Rogers v. Sample*..... 144
5. Not avoided by separation of jurors after agreeing on a sealed verdict if they afterwards come into court and report the same, the separation being by agreement of parties. *Id.*
6. In an action on a contract for the exchange of certain real and personal property, evidence examined and found to sustain the verdict as to \$295.25, but not as to \$204.75, which latter sum was required to be remitted as a condition of affirmance. *Brown v. Drake* 695

Villages.

Where a party sustained severe injuries by falling on a sidewalk shown to have been in a dangerous condition for a long time before the accident, and the village authorities had full notice thereof, a verdict of \$1,000 against the village was not disturbed. *Village of Valparaiso v. Donoran*.....406, 411

Voluntary Payment.

1. Of taxes cannot be recovered back. *F., E. & M. V. B. Co. v. Holt County* 747
2. Question of, held not to be in the case under consideration. *Id.*

Waiver. See **INSURANCE**, 6, 11. **ROADS**, 3. **STIPULATIONS.**

Waters.

1. Where an upper riparian owner, on a small creek, maintains extensive feeding-barns, in which are kept a maximum of 3,750 head of cattle, the excretions from which are conveyed into the creek through sewers, and carried down to the land of lower riparian owners, causing an atmospheric stench, and polluting the creek so that it was unfit to be used for watering cattle, such lower proprietors

are entitled to an injunction preventing the continuance of the nuisance, and this without reference to the question as to whether they have a remedy at law. *Barton v. Union Cattle Co.*.....350, 357

2. The right to injunction will not be denied because plaintiffs might, at small cost, provide means for watering their cattle without resorting to the creek. *Id.*.....354-8

Water Supply.

Contract to furnish a city with, set out; evidence examined and found to show that plaintiff failed to comply with such contract, and that trial court properly directed a verdict for defendant. *Burns v. City of Fairmont.*..... 873

Wills.

1. Where a party, having a daughter by a former marriage, devised his realty to a trustee for the use of his second wife so long as she should remain his widow, but she afterward remarried, the estate of the son, who was the sole issue of the second marriage, and died unmarried and without issue, under sec. 30, ch. 23, Comp. Stats., descended in equal proportions to his mother and half-sister. *Rice v. Saxon.*..... 386
2. The fact that the widow had elected to take under the will instead of claiming dower in the estate, merely precluded her from claiming aught against the heirs not provided for in the will, and did not debar her of an estate of inheritance from the son, of the property mentioned in the will. *Id.*..... 385

Witnesses. See EVIDENCE, 6, 11, 13. EXPERT EVIDENCE.

Words and Phrases. See DECREE. FRAUDULENT CONVEYANCES, 2. PLEADING, 2, 10. SLANDER, 2.

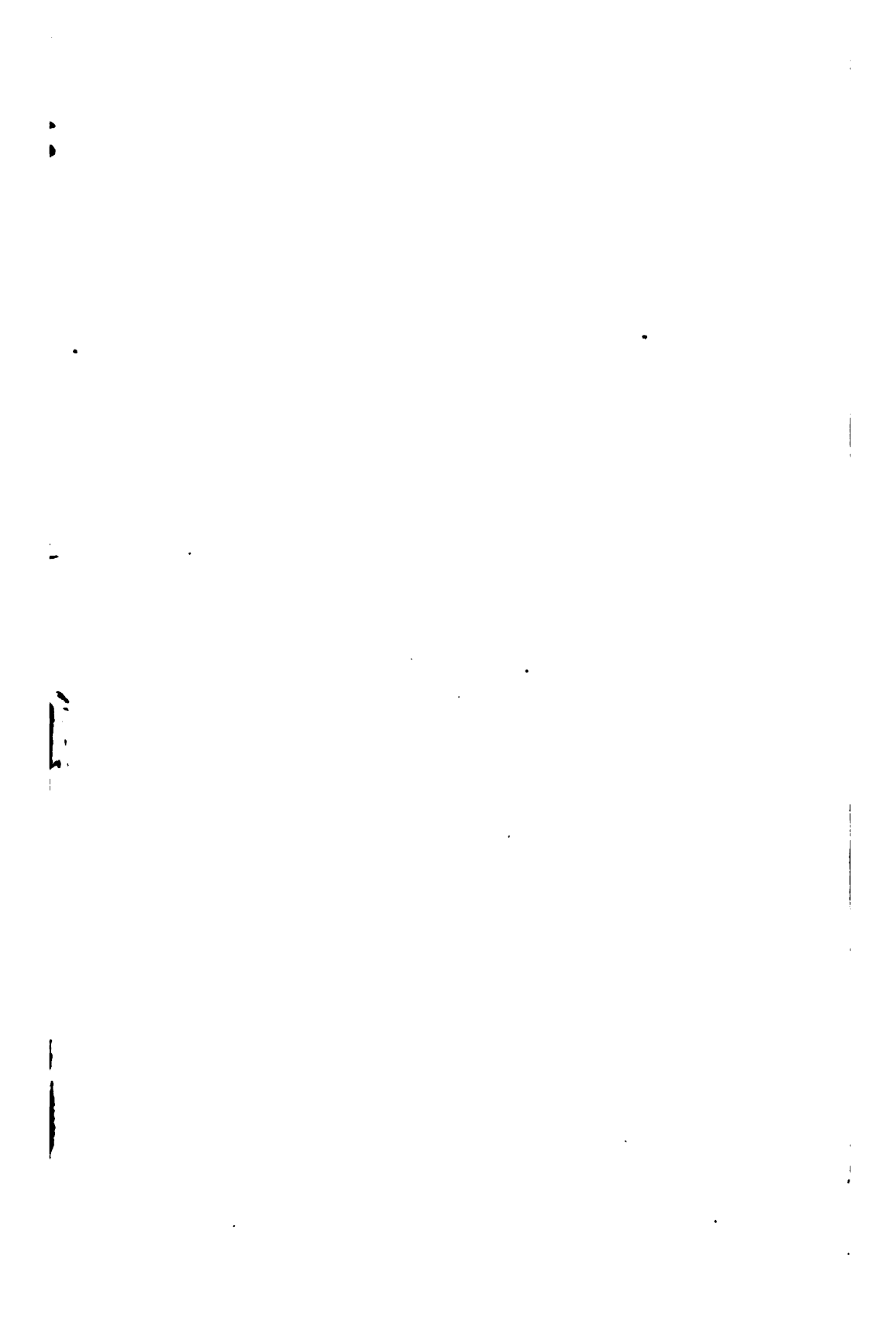
1. "Guest" and "lodger" defined. *Pullman Palace Car Co. v. Lowe.*.....241-7
2. The word "judgment" is used synonymously with "prudence" in an instruction that it is a master's duty to "use ordinary and reasonable care and judgment" to provide suitable and safe machinery for his servants to use, and the instruction is not vitiated by so using the word. *Joseph Garneau Cracker Co. v. Palmer.*..... 311

Work and Labor. See ASSUMPSIT. HEATING APPARATUS. INSTRUCTIONS, 9.

1. In an action to recover for labor performed in erecting a party-wall, while the preponderance of evidence failed to show that plaintiff had placed 20 inches of concrete under the wall as he had contracted to do, yet it could not be said that there was not evidence to sustain the findings

- of the court in plaintiff's favor, and they were not disturbed. *Livesey v. Festner*..... 339
2. The defense having been predicated on the alleged fact that plaintiff had placed a footing of only 14 inches of concrete, and defendant having marshalled his evidence to establish such fact, a motion for a new trial on the ground that evidence had since been discovered showing said concrete to be but 12½ or 13 inches thick, was properly overruled. *Id.*..... 340
- Writs.** See QUO WARRANTO, 2. SUMMONS.

Ex. Jf.



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